



June 2, 2026

Submitted Electronically to  
Regulations.gov

Samuel D. Rauch III  
Deputy Assistant Administrator for Regulatory Programs  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

Re: Advance Notice of Proposed Rulemaking to Amend the North Atlantic Right Whale Vessel Strike Reduction Rule (91 Fed. Reg. 10,580 (Mar. 4, 2026))  
Docket ID No. NOAA-NMFS-2026-0364  
RIN 0648-BO42

Dear Administrator Rauch:

America is up to its neck in rules, and the tide shows no sign of turning. No one in America has taken on more water in recent decades than those in maritime industries and coastal communities. It was, therefore, a welcome development when, on March 4, 2026, the National Marine Fisheries Service (NMFS) announced<sup>1</sup> its intention to amend the North Atlantic Right Whale Vessel Strike Reduction Rule, 50 C.F.R. § 224.105 (the Vessel Speed Rule or the Rule).

[Southeastern Legal Foundation](#) (SLF)<sup>2</sup> submits these comments in response to the ANPRM on behalf of itself and its clients Alan Eason, John Moisson, Paul Sistare, and Keeley Megarity,<sup>3</sup> owners, former owners, and captains of watercraft subject to the Vessel Speed Rule. Messrs. Eason, Moisson, and Sistare are victims of the Vessel Speed Rule's overreach and punitive fines, and Mr. Megarity is also subject to the illegal, draconian, and inefficient rule.

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<sup>1</sup> *Advance Notice of Proposed Rulemaking To Amend the North Atlantic Right Whale Vessel Strike Reduction Rule*, 91 Fed. Reg. 10,580 (Mar. 4, 2026) (ANPRM).

<sup>2</sup> Southeastern Legal Foundation (SLF) is a national, nonprofit legal organization dedicated to Rebuilding the American Republic<sup>®</sup> by reclaiming civil liberties, protecting free speech, securing property rights, and restoring constitutional balance through both legal action against the government and educational programs. Since 1976, we set lasting precedent both in and out of the courtroom to preserve and protect Americans' rights under our Constitution.

<sup>3</sup> We refer to SLF and the additional commenters collectively as SLF for brevity unless otherwise indicated.

SLF supports your decision to amend the Rule to fix some of its most glaring defects. And we appreciate that the ANPRM's stated goal is "to reduce unnecessary regulatory and economic burdens on the regulated community," including the Rule's significant costs on American businesses and individuals despite little to no benefit. But because the Rule is illegal, amendment isn't enough. Absent rescission, the Rule will continue to harm stakeholders. It must go.

SLF urges you to fully rescind the Vessel Speed Rule for five key reasons:

- First, the Rule is unlawful. It exceeds the scope of the delegated powers and answers a major question without clear congressional authorization. The single best meaning of the statutes the National Oceanic and Atmospheric Administration (NOAA) and NMFS relied upon when enacting the Rule—the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA)<sup>4</sup>—does not authorize it. And even if they did, that delegation would violate the nondelegation doctrine.
- Second, the Rule's foundational assumptions about the effectiveness of technology are no longer correct, if they ever were. Technology is now capable of doing much more to protect right whales than this heavy-handed speed limit ever did.
- 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 negligible benefits exist.
- Fourth, rescission is consistent with the President's directives to eliminate unlawful regulation in an expedited fashion.
- Fifth, rescission promotes NOAA's priorities.

Time is of the essence. SLF urges NMFS, as it has now done several times over the last 20 months, to rescind the Vessel Speed Rule, and to do so on an expedited basis. At the very least, NMFS should amend it to severely curtail its harms.

### **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.<sup>5</sup> The Rule originally had a five-year sunset clause, but it became permanent in 2013.<sup>6</sup> Its stated purpose was "to reduce the likelihood

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<sup>4</sup> See *Endangered Fish and Wildlife; Final Rule To Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales*, 73 Fed. Reg. 60,173, 60,182 (Oct. 10, 2008) (citing 16 U.S.C. § 1382(a) of the MMPA and 16 U.S.C. § 1540(f) of the ESA).

<sup>5</sup> 73 Fed. Reg. 60,173 (Oct. 10, 2008).

<sup>6</sup> 78 Fed. Reg. 73,726 (Dec. 9, 2013).

of deaths and serious injuries to endangered North Atlantic right whales that result from collisions with ships.”<sup>7</sup>

The Rule establishes a speed limit of ten knots in certain areas at certain times of year along certain portions of the U.S. eastern seaboard for all non-sovereign vessels 65 feet or greater in overall length.<sup>8</sup> 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.<sup>9</sup> Violations of NMFS rules are punishable by fines and even imprisonment.<sup>10</sup>

In addition, NMFS established a program of voluntary slow speed in designated Dynamic Management Areas (DMAs).<sup>11</sup> Under this program, DMAs of at least a three-nautical-mile radius are established upon the sighting of three or more North Atlantic right whales in areas not already included in SMAs.<sup>12</sup> The DMAs are temporary, lasting for 15 days with a possible 15-day extension if whales are resighted in the same area.<sup>13</sup> NMFS recently augmented its program with “Right Whale Slow Zones,” which are similar to DMAs, but can be triggered upon either a visual or acoustic detection of a North Atlantic right whale, with the recommendation that all vessels reduce speed to ten knots or less, regardless of vessel length.<sup>14</sup>

This is a Rule with real bite. In 2022 and 2023, NOAA collected \$950,306 in civil penalties for violations.<sup>15</sup> And, as mentioned above, 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. Paul Sistare of Weston, Florida was fined \$13,500. John Moisson of Naples, Florida was assessed a \$30,000 penalty that he settled and split with Alan Eason, his boat captain. Not one of these individuals even knew of the Rule at the time they took their journey.

The Rule attempts to fix a problem that mariners already want to avoid, and it does so using unfairly draconian penalties. One wonders why NMFS ever thought that the best way to protect whales was with a speed limit that turns NOAA into a marine highway patrol. After all, no one—certainly not mariners—wants to hit a whale. Striking a whale not only harms a majestic creature; it risks the safety of the captain and crew and would likely cause severe damage to the boat. Indeed, NMFS itself acknowledged as far back as 2008 that “all mariners are interested in avoiding whales.”<sup>16</sup> If so, NMFS should just supply boaters with the information they need to avoid hitting a whale and incentivize technology that would help with that.

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<sup>7</sup> *Id.*

<sup>8</sup> 50 C.F.R. § 224.105(a).

<sup>9</sup> *Id.* §§ 224.105(a)(1)–(3), (c).

<sup>10</sup> 16 U.S.C. § 1375; 16 U.S.C. § 1540.

<sup>11</sup> 73 Fed. Reg. at 60,180.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> NMFS, “Help Endangered Whales: Slow Down in Slow Zones,” <https://perma.cc/CSU9-XMF6>.

<sup>15</sup> NMFS, “North Atlantic Right Whale Speed Zone Dashboard,” <https://perma.cc/LL53-7BUG>.

<sup>16</sup> 73 Fed. Reg. at 60,182.

At least in 2008, the limits of technology were a major obstacle. NMFS concluded that the technology of the time was not yet proven enough to give boaters the information they need to avoid vessel strikes.<sup>17</sup> NMFS promised, however, that it was committed to an ultimate solution involving technology and that it would periodically review emerging technologies and revise the Rule when technology was as effective in protecting right whales as the Rule.<sup>18</sup> It has not done so but it should consider this approach now.

**SLF Has Repeatedly Urged NOAA and NMFS to Restore Constitutional Balance by  
Constraining Unlawful Exercises of Agency Authority**

For 50 years, SLF has defended the Constitution by pressing for the administrative state's return to founding principles. Although this Nation was founded with a system of representative government where exclusively the legislative branch legislated,<sup>19</sup> Americans today are, sadly, used to a different sort of government—one that the Nation's founders took great steps to prevent. The modern administrative state undermines our representative form of government by taking more and more of the lawmaking function from Congress and giving it to unelected bureaucrats deep within the executive branch. That bureaucracy—a Leviathan if there ever was one—occupies an ever-growing role in the lives of everyday Americans. Even, it seems, in the open ocean, when Americans are engaged in harmless boating activity.

SLF's efforts have yielded progress. In *UARG v. EPA*, SLF successfully challenged EPA's attempt to "assert[] newfound authority to regulate millions of small sources" and "rewrite clear statutory terms to suit its own sense of how the statute should operate."<sup>20</sup> In language that seems strangely appropriate given the subject at hand, the Court concluded that it was "not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery" in search of regulatory authority.<sup>21</sup>

Lately, SLF has watched with increasing alarm as NOAA, through NMFS, has exhibited the worst tendencies of an unconstrained agency unmoored from the separation of powers. SLF sounded the alarm when, on April 6, 2023, NMFS requested comments on a proposal to establish a year-round curfew in the Gulf of America and a 10-knot boat speed limit to protect Rice's whale in its core habitat areas off the Florida gulf (Rice's whale petition)<sup>22</sup>—an alarm NMFS wisely heeded when it declined to promulgate the proposed rule. SLF sounded the alarm again when, on August 27, 2025, NOAA called for recommendations for *Restoring American Seafood*

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<sup>17</sup> 73 Fed. Reg. at 60,181–82.

<sup>18</sup> 73 Fed. Reg. at 60,182.

<sup>19</sup> The Constitution vests "[a]ll legislative Powers" in Congress, U.S. Const. art. I, § 1, and Congress cannot "abdicate" or "transfer" "the essential legislative functions with which it is thus vested," *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) (internal quotation marks omitted).

<sup>20</sup> See *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014) (*UARG*).

<sup>21</sup> *Id.*

<sup>22</sup> See *Endangered and Threatened Species; Petition To Establish a Vessel Speed Restriction and Other Vessel-Related Measures To Protect Rice's Whales*, 88 Fed. Reg. 20,846 (April 7, 2023).

*Competitiveness.*<sup>23</sup> SLF has also filed amicus briefs opposing NMFS's claims that its statutory interpretations were entitled to deference.<sup>24</sup> Lately, NMFS has aggressively begun to enforce the Vessel Speed Rule, 50 C.F.R. § 224.105, threatening innocent boaters with criminal penalties and forcing them to pay crippling fines to avoid criminal prosecution.

SLF has long maintained that the administrative state poses a real risk to America's constitutional system of government. To that end, it has used both the Administrative Procedure Act (APA) and the Constitution to challenge agencies and agency heads to examine their rules and methods of rulemaking. When agencies fail to heed those limits, SLF challenges agency actions in court on behalf of those harmed *pro bono*.

### **The Vessel Speed Rule's Civil and Criminal Penalties Have Crippling Effects on Hard-Working Americans, Coastal Communities, and the U.S. Boating Industry**

Before diving into the depths of our comments, we want to take the opportunity to introduce you to Messrs. Megarity, Sistare, Eason, and Moisson—real people who love and enjoy the ocean and who faced civil and criminal penalties, including potential jailtime, for violating the Rule's 10-knot speed limit (which, it is worth remembering, is slower than the speed of an average *golf cart*).

First, meet Keeley Megarity. He is the owner of C-Student, a 72-foot Viking boat that ports in Southside Place, Texas. He fishes throughout the Gulf of America and the Atlantic Coast, including in places and times when the Vessel Speed Rule is effective. Mr. Megarity is a member of the Houston Big Game Fishing Club. In 2023, C-Student took third prize in the Houston Big Game Fishing Club's top private boat of the year award. Mr. Megarity resides in Houston, Texas.

Next, meet Paul Sistare. He is the owner of the M/V Southern Joy, a 70-foot boat that ports in Fort Lauderdale, Florida. He received a Notice of Violation and Assessment (NOVA) for violating the Vessel Speed Rule on March 22 and April 2, 2023. His assessed penalty was \$15,000. Mr. Sistare settled with NMFS for \$13,500. He resides in Weston, Florida.

Alan Eason is a freelance boat captain who delivers boats 65 feet and longer. He received a NOVA for violating the Vessel Speed Rule on November 14, 15, 16, and 17, 2022, when he delivered the M/V Rumours, a 72-foot Hatteras boat, from Virginia to Naples, Florida. The assessed penalty was \$30,000. Mr. Eason ended up settling for a reduced amount, which he split with the owner, John Moisson. Mr. Eason is still a freelance boat captain who expects to operate boats 65 feet and longer in the regulated areas during the regulated seasons. Mr. Eason resides in Hollywood, Florida.

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<sup>23</sup> See SLF Comment in Response to NMFS's Request for Recommendations for Restoring American Seafood Competitiveness (Dec. 15, 2025), available at <https://perma.cc/DUR7-X9VA>.

<sup>24</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

And finally, John Moisson was the co-owner of the M/V Rumours. He was penalized along with Mr. Eason for violating the Vessel Speed Rule. The M/V Rumours ported in Naples, Florida during Mr. Moisson's ownership.

SLF is proud to represent Messrs. Megarity, Sistare, Eason, and Moisson in sounding the alarm and continuously urging NOAA and NMFS to reexamine one of its most far-reaching assertions of regulatory power: the Vessel Speed Rule.

### Comment

SLF is committed to better dialogue with NOAA and NMFS to restore constitutional balance. To that end, on November 1, 2024, SLF submitted a formal petition for expedited rule change recommending rescission of the Rule.<sup>25</sup> Soon after, NMFS told us that it received the petition. And although we hoped that NOAA would promptly begin the rescission process and respond to SLF's petition, the petition has sat for over a year and a half with no direct updates or communication, much less a formal response.

Although SLF appreciates and supports the principles animating this ANPRM, NOAA's and NMFS's failure to take action to *rescind* the Rule is inconsistent with this administration's clear prioritization of the rapid rescission of regulations not authorized by statute. *See, e.g.*, Office of Management and Budget, Executive Office of the President, *Streamlining the Review of Deregulatory Actions*, No. M-25-36, Oct. 21, 2025 (OIRA Memo) (discussing presidential memoranda and executive orders and providing guidance on expediting deregulatory efforts to help the American people).

As SLF detailed in the petition and explains herein, the Rule is an ideal candidate for immediate rescission because it is facially unlawful in light of the "controlling statute [and] the Constitution." OIRA Memo at 4. As a result, pursuant to guidance from the Executive Office of the President, NMFS "lacks discretion and authority to retain it, even during the pendency of notice and comment proceedings and notwithstanding that the regulation might have engendered reliance interests or made good policy sense at adoption." *Id.* at 4–5. Additionally, the Rule imposes unreasonable costs given advances in technology that have better equipped boats to avoid striking whales. These include, but are not limited to, common advanced detection systems, marine radar, thermal imaging systems, satellite tagging, and acoustic buoys.

The Rule, although well intentioned to protect endangered North Atlantic right whales (NARW) 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.

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<sup>25</sup> NMFS confirmed receipt on November 21, 2024, but to date has failed to formally respond to SLF's petition or take action on it. The petition is available for review at <https://perma.cc/G5N2-CFFG>.

The Rule is also outdated and unjustified. Even if it made sense when NMFS promulgated it in 2008, it no longer does given advances in technology that better mitigate the risk 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. The Rule robs Americans of their basic freedom to travel across the open ocean by threatening crippling fines and *jail time* for conduct that is otherwise innocent and commonplace. Messrs. Eason, Moisson, and Sistare are three individuals who, as examples, NOAA heavily fined for simply operating a boat at a safe speed in the designated areas during the relevant period.

NOAA and NMFS should repeal this Rule immediately for the reasons more fully outlined below. Rescission would put NMFS into compliance with the law, would not harm NARWs, and would permit technological enhancements to modern large vessels to continue delivering safer and more effective methods of protecting the NARW than the high sea speed limit currently in effect. The Vessel Speed Rule is not an effective or reasonable method of achieving the stated policy goals considering technological advancement and the success of voluntary, cooperative measures.

We support you in your efforts to rein in the administrative state and help free U.S. fishing businesses and recreational boaters from burdensome and unlawful restrictions on their freedom to sail the open ocean. But the Rule should not just be amended—it should go.

#### **I. The Rule must be rescinded immediately because it is unlawful.**

Because the Rule grabs hold of power that NMFS was never given—and that it knows it was never given—NMFS must immediately rescind it.

Where a statute is silent on an agency's power to regulate something, the agency cannot regulate it.<sup>26</sup> In other words, silence is not permission; agencies cannot claim regulatory power via a “nothing-equals-something” argument.<sup>27</sup>

NMFS has, in the past, claimed regulatory authority for the Rule from the Endangered Species Act, 16 U.S.C. § 1540(f), and the Marine Mammal Protection Act, 16 U.S.C. § 1382(a).<sup>28</sup> Those texts say nothing about boat speed limits. Likewise, NOAA and NMFS made pleas to Congress to create the speed limit power it now claims to wield. Those pleas went unheeded.

NMFS created the Rule anyway. It now restricts vessels small enough for recreational use from traveling more than ten knots along large areas of the Atlantic Coast for upwards of seven months of the year, under pain of significant civil and criminal penalties. 50 C.F.R. § 224.105. The Rule is the definition of an “elephant in a mousehole.”

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<sup>26</sup> *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) (discussing similar language under Magnuson-Stevens Fishery Conservation and Management Act)

<sup>27</sup> *Id.*

<sup>28</sup> See 73 Fed. Reg. at 60,182 (citing 16 U.S.C. § 1382(a) of the MMPA and 16 U.S.C. § 1540(f) of the ESA).

Further, even if NOAA and NMFS believe they possess the power to create a high-seas speed limit, hidden in vague language permitting them to enact “necessary and proper” regulations—a law they did not believe justified the Rule when they asked Congress for a more specific power—that delegation runs afoul of the nondelegation doctrine.

SLF recognizes that in promulgating the Rule, NMFS aimed to protect endangered North Atlantic right whales from being struck by boats. But there is no general administrative law power to “go forth and do good.”<sup>29</sup> In other words, even if NMFS had good intentions in promulgating the Rule, the law does not permit it. Because Congress never authorized the Rule under the powers it delegated to NOAA and NMFS, NMFS must now take action to rescind it.

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

NMFS claims authority for the Rule in the ESA and the MMPA.<sup>30</sup> Under Section 112(a) of the MMPA, 16 U.S.C. § 1382(a), the Secretary of Commerce is authorized to prescribe such regulations as are “necessary and appropriate” to carry out its purposes.<sup>31</sup> Under Section 11(f), 16 U.S.C. § 1540(f), the Secretary of Commerce is authorized to issue regulations “as may be appropriate to enforce” the ESA.<sup>32</sup>

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 reading of the statutes.<sup>33</sup> Here, NMFS is relying on the vaguest authority for a rule of tremendous consequence. At most, the cited provisions of the MMPA and ESA contain “textual dead zone[s]” that NMFS may not treat “as a mere ‘gap’ for it to fill.”<sup>34</sup>

The MMPA and ESA’s “necessary” and “appropriate” language is there to enable agencies to effect the clear prohibitions of the Acts, not to enable agencies to create new prohibitions. Here, that would mean, for example, regulations related to marine mammal stock assessments, to the Secretary’s grantmaking authority, or to the Secretary’s authority to transfer protection of a marine

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<sup>29</sup> *Glob. Van Lines, Inc. v. Interstate Commerce Comm’n*, 714 F.2d 1290, 1296 (5th Cir. 1983) (“A general congressional exhortation to ‘go forth and do good,’ without more, is not a proper foundation for the sound development of administrative law.”).

<sup>30</sup> See 73 Fed. Reg. at 60,182 (citing 16 U.S.C. § 1382(a) of the MMPA and 16 U.S.C. § 1540(f) of the ESA).

<sup>31</sup> 16 U.S.C. § 1382(a).

<sup>32</sup> 16 U.S.C. § 1540(f).

<sup>33</sup> *Loper Bright*, 603 U.S. at 400.

<sup>34</sup> 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.”).

mammal species in an area to an individual state. All of these are powers clearly authorized under the MMPA that arguably need additional regulatory clarification. In other words, those are powers clearly delegated to the agency—they are written in the law—that have gaps the Secretary is free to fill. In the case of the Rule, though, NMFS did not merely fill in a gap in an otherwise extant power; it invented an entirely new power for itself.

*1. Attempts to get the power to regulate vessel speed have failed before Congress.*

NMFS demonstrated that it understands that these statutes do not give it the power to set a speed limit. In fact, it badgered Congress for additional authority precisely because it understood that these statutes did not give it that power. There are many examples of testimony from NOAA and its witnesses in the 2003 hearings<sup>35</sup> that demonstrate the agency’s awareness of the limits of its own power and thus the need for additional statutory authority before it could enact its desired speed limit.<sup>36</sup>

More recently, in 2021, the House of Representatives considered a bill that would have given NMFS the authority it claimed to have beginning with the 2008 Rule. Under H.R. 5957 § 121(a)(1) (2021), the House proposed to amend the MMPA to allow the Secretary to establish almost *exactly* the Rule at issue here: “vessel speed restrictions to reduce vessel strikes” seasonally

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<sup>35</sup> 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).

<sup>36</sup> 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”).

or year-round in designated areas “known to experience vessel strikes.” The legislation gained a mere eight co-sponsors and did not make it out of subcommittee.<sup>37</sup> Congress did not authorize the Rule.

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*—not a mandate to impose a speed limit—to develop “mitigation measures” to reduce “mortality and serious injury from vessel strikes” to protect endangered whales.<sup>38</sup> That approach differs markedly from the Rule and is yet another sign that the Rule is not based on the best reading of the statutes.

In considering the Rule’s rescission, NMFS should appreciate the significance of its prior statements and Congress’s response. When Congress fails to act, it is making a choice.<sup>39</sup> 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.<sup>40</sup> 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.”<sup>41</sup> 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.”<sup>42</sup>

2. *Basic rules of statutory interpretation foreclose the creation of the Rule to address unintentional whale strikes.*

Basic rules of statutory interpretation, such as the general/specific canon, likewise demonstrate that the Rule is not based on the best reading of Section 112(a) of the MMPA. Congress gave separate regulatory authority in Section 103 to prohibit injuring marine mammals

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<sup>37</sup> *To Reduce Risks to Marine Mammals, and For Other Purposes*, H.R. 5957, 117th Cong. (2021), <https://perma.cc/ZYW8-E8GY>.

<sup>38</sup> 16 U.S.C. § 1390(a), (b)(2).

<sup>39</sup> *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).

<sup>40</sup> *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”).

<sup>41</sup> *West Virginia v. EPA*, 597 U.S. 697, 731 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000)).

<sup>42</sup> *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)).

through “takings” regulations.<sup>43</sup> 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[.]”<sup>44</sup> “Take” is defined under the MMPA to mean harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.<sup>45</sup> These are intentional actions, not unintentional strikes. This is the closest the MMPA comes to authorizing rules designed to prevent injuring a marine mammal. But NMFS did not consult the required factors or cite this separate source of authority when it enacted the Rule.<sup>46</sup> Had it done so, the Secretary would have needed to first consult five statutorily required factors that balance the competing interests between population stocks, treaty obligations, environmental considerations, fishery resources, and economic and technological feasibility.<sup>47</sup>

It would violate the general/specific canon of statutory construction if NMFS could *also* regulate activity with the potential to injure a marine mammal through Section 112(a).<sup>48</sup> Section 112(a) is a general grant of authority.<sup>49</sup> Congress did not enact specific takings regulations to address intentional harms to marine mammals and then authorize regulations prohibiting unintentional harm to marine mammals through general, broader, and different language. Under that interpretation, the “specific statute” would be “nullified by a general one.”<sup>50</sup> That is not the best reading of the statutes that make up the MMPA.

If Section 112(a) really gave NMFS separate and far greater power to prevent *accidentally injuring* right whales without the constraints in Section 103, then there is no point to Section 103 and its limitations on agency takings regulations are superfluous. That is not a plausible interpretation. Congress placed important constraints governing takings regulations under Section 103 that balance the interest in protecting endangered marine mammals with allowing private economic activity.<sup>51</sup> This carefully designed process cannot be sidestepped by invoking a general

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<sup>43</sup> 16 U.S.C. § 1373(a) (titled “Regulations on *taking* marine mammals”) (emphasis added). “Take” is not defined to include *unintentional* “harm” under the MMPA. *See* 16 U.S.C. § 1362(13) (defining takings). As explained below, the Rule could not be justified under NMFS’s takings authority either because merely driving a boat faster than ten knots does not qualify as a taking, even if there is an *accidental* collision at eleven knots.

<sup>44</sup> 16 U.S.C. § 1373(a)

<sup>45</sup> 16 U.S.C. § 1540(f).

<sup>46</sup> *See* 73 Fed. Reg. at 60,182 (citing 16 U.S.C. § 1382(a) of the MMPA and 16 U.S.C. § 1540(f) of the ESA).

<sup>47</sup> *See* 16 U.S.C. § 1373(b) (prescribing five factors for consideration, including economic and technological feasibility).

<sup>48</sup> *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).

<sup>49</sup> *See* 16 U.S.C. § 1382(a).

<sup>50</sup> *United States v. Mendez*, 560 F. App’x 262, 269 (5th Cir. 2014) (Higginbotham, J., dissenting) (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987), and citing cases).

<sup>51</sup> *See* 16 U.S.C. § 1373(b) (prescribing five factors for consideration, including economic effects and technological feasibility); *id.* § 1373(d) (requiring regulations be made on the record after an

grant of power to enact “necessary” or “appropriate” regulations.<sup>52</sup> 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.<sup>53</sup> On its face, Section 11(f) is not a “stand-alone source of authority to validate any rule [NMFS] wishes.”<sup>54</sup> 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 final point, the fact that the Rule has existed since 2008 does not mean that it is somehow based on the best reading of the statutes. An agency cannot “defeat a statute’s text by ‘adverse possession.’”<sup>55</sup> “[W]hile longstanding agency practice might have the power to persuade, it has never had the power to control.”<sup>56</sup> Reliance on unchallenged past practice “is irreconcilable with the judicial obligation to interpret the statutes that Congress actually enacted.”<sup>57</sup> So, to the extent the Rule went unchallenged, that does not mean that it is based on the best reading of the statutes.

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.

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opportunity for an agency hearing); *id.* § 1373(f) (requiring report to Congress on permits issued to take marine mammals).

<sup>52</sup> 16 U.S.C. § 1382(a).

<sup>53</sup> 16 U.S.C. § 1540(f) (authorizing “appropriate” regulations “to enforce this Act”).

<sup>54</sup> *Contender Farms, L.L.P. v. USDA*, 779 F.3d 258, 273 (5th Cir. 2015).

<sup>55</sup> *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, 823 (“[A] federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge.” (quoting *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 821 (6th Cir. 2015))); *W. Virginia*, 597 U.S. at 725 (observing that prior EPA rule the agency cited as historic precedent “was never addressed by a court”); *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.”).

<sup>56</sup> *Rest. L. Ctr. v. U.S. 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)).

<sup>57</sup> *Career Colls. & Sch. of Tex. v. U. S. Dep’t of Educ.*, 98 F.4th 220, 241 (5th Cir. 2024).

**B. The broad, undefined power NMFS claims that permits it to enact any regulation it wants to protect NARWs violates the nondelegation doctrine.**

In the alternative, if the statute does delegate NMFS the power to create and enforce the Vessel Speed Rule, that delegation is unlawful. Any agency that can enact a purely precautionary measure criminalizing the activity of private boaters across nearly an entire coastline for half the year is performing a core legislative function. Nothing about the operative terms in the MMPA or ESA contains any principle governing the exercise of discretion. Here, Congress merely tasked the agency with enacting “necessary and appropriate” regulations to fill up the details of its extant powers.<sup>58</sup> If that means coastal speed limits, then the two laws contain a “total absence of guidance” that provides any kind of limitations upon regulations that carry serious criminal and civil penalties.<sup>59</sup> This guidance can only come from Congress; NMFS cannot supply its own intelligible principle.

**II. Modern technological advances provide better alternatives for protecting right whales than a high-seas speed limit.**

Technology capable of giving mariners the information they need to know whales’ locations and how to avoid them now exists. A comparison of the regulatory solution embodied by the Vessel Speed Rule with a solution based on technology and information demonstrates why the Rule should be amended to embrace technology or repealed outright. Put simply, the Rule has done nothing to help NARWs. NMFS’s data has showed at best “weak evidence” that the Vessel Speed Rule was effective.<sup>60</sup> Another analysis NMFS relied on when assessing right whale stocks “found there was no apparent trend up or down in ship strike serious injury and mortality between 2000 and 2017.”<sup>61</sup> In its 2020 assessment of the Rule’s effectiveness, NMFS concluded that “it is not possible to determine a direct causal link” between the number of vessel strikes and the Rule.<sup>62</sup> Even the most generous assessment of the Rule’s effect would place the cost at \$75 million in lost economic opportunity per vessel strike prevented.<sup>63</sup> That money can be more effectively deployed elsewhere.

By comparison, technology offers mariners the information they need to avoid striking objects in the water. At the outset, one thing should be obvious—no one wants to run over a whale or any other object in the water. Mariners are outdoorsmen. They value rare marine mammals as much as any environmentalist. And even if they did not, they have a self-interested reason to avoid hitting 50-foot, 200,000-pound objects in the water. Striking a right whale poses a serious threat to both craft and crew. An object as large as a right whale would severely damage expensive equipment, if not sink a boat outright and threaten the lives of those onboard. When mariners know

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<sup>58</sup> See 16 U.S.C. §§ 1373(a), 1540(f).

<sup>59</sup> See *Jarkesy*, 34 F.4th at 462, *aff’d on diff. grounds*, 144 S. Ct. 2117 (2024).

<sup>60</sup> NARW Stock Assessment, *supra* note 12, at 27.

<sup>61</sup> *Id.*

<sup>62</sup> 2020 Rule Assessment, *supra* note 26, at i.

<sup>63</sup> See *id.* at 23.

a right whale's location, they will voluntarily steer clear. They just need the information. And that information is now easily accessible, displacing the need for the Rule.

NMFS acknowledged as much when it wrote the Vessel Speed Rule itself: "The use of technological solutions to minimize or eliminate a problem such as the threat of ship strikes to whales is the most desirable approach. Employing an innovation or technology that can truly mitigate a problem is preferable and should be pursued."<sup>64</sup> Sixteen years after NMFS recognized that technology would one day offer a superior approach, that day has come.

The boats covered by the Vessel Speed Rule are well positioned to adopt sophisticated technology. These are large vessels, equipped with sophisticated navigational equipment. And, as compliance with the voluntary slowdown areas reveals, boat captains want to avoid striking whales even absent the heavy-handed force of the Rule.

As SLF's 2024 petition seeking rescission explained, already existing 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.
- **Sentry Cameras by SEA.AI:** Capable of detecting a buoy at 700 meters and a dinghy at 3000 meters.
- **AI-Ris Computer Vision Sensor by Sea Machines Robotics:** Provides advanced detection and classification capabilities for small objects at 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 similar products are commonly installed on any vessel large enough to be covered by the Rule. Because right whales are enormous—up to over 50 feet long and weighing more than 200,000 pounds—these tools can easily detect them well before a strike, giving mariners plenty of time to steer around them and reduce speed.

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<sup>64</sup> 73 Fed. Reg. at 60,181.

**Marine Radar** – Marine radar is an accepted and proven technology to improve navigational safety and detect large marine mammals. Radar has been used in biological research to monitor wildlife, such as detecting and tracking fin whales and smaller mammals up to 5.5 kilometers or farther away at lower sea states.<sup>65</sup> 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.<sup>66</sup> 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. It was announced in 2023 that NOAA allocated \$3.5 million from the Inflation Reduction Act to deploy satellite tags on right whales.<sup>67</sup> Yet, NMFS’s progress 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.<sup>68</sup>

**Acoustic buoys** – Scientists at Woods Hole Oceanographic Institution have developed acoustic buoys to protect right whales.<sup>69</sup> These buoys, along with underwater gliders, are designed to 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 from a single call.<sup>70</sup> 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.<sup>71</sup> They can operate continuously, regardless of weather conditions, and provide near real-time data to mariners.

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<sup>65</sup> DeProspo, 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.

<sup>66</sup> 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).

<sup>67</sup> 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>.

<sup>68</sup> Sebastian Richter et al., “Coastal Marine Mammal conservation using thermal imaging-based detection systems,” <https://perma.cc/7CK4-RU79>.

<sup>69</sup> Patrick Whittle, Associated Press, “Robotic buoys developed to keep Atlantic right whales safe,” May 28, 2022, <https://perma.cc/QJ6Q-4GJZ>.

<sup>70</sup> 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>.

<sup>71</sup> *Id.*

This technology has produced promising results where it is currently 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.<sup>72</sup> And they are comparatively superior to general speed restrictions, which are static, 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.<sup>73</sup> And it exempts some large crafts and only applies to larger boats.<sup>74</sup> But whales move and may not follow expected patterns.<sup>75</sup> Buoys, however, can be deployed cheaply up and down the coast, tracking whales outside the zones. They can be used all year. They can relay information to all boats, including to vessels owned by the United States, or to a state law-enforcement entity, or to those smaller than 65 feet—all of whom are exempt from the Rule but could still benefit from a reduced risk of collision with a right whale.

Acoustic buoys are now proven technology. Researchers have deployed a “Whale Safe” system in California.<sup>76</sup> 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 strike of an endangered whale of any species has been recorded.<sup>77</sup> The obvious advantages of modern acoustic buoys to the current speed limit demonstrate that the technology of 2008 should no longer limit NMFS and NOAA. 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.

### **III. The Rule has caused substantial harm to ship owners and operators far beyond any value it may have provided.**

The Rule’s costs outweigh its benefits, even before the 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

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<sup>72</sup> 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>.

<sup>73</sup> *Id.* § 224.105(a)

<sup>74</sup> *Id.*

<sup>75</sup> 2020 Rule Assessment, *supra* note 45, 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”).

<sup>76</sup> Daniel Hentz, Woods Hole Oceanographic Institute, “Whale Safe,” (October 19, 2021), <https://perma.cc/MUX7-9GUQ>.

<sup>77</sup> *Mutual of Omaha’s Wild Kingdom Protecting the Wild: Safe Passage for Whales* (NBC television broadcast, Oct. 12, 2024).

determine a direct causal link” between the Rule and reductions in vessel strikes, before then proceeding to lay out the best-case scenario.<sup>78</sup> In the ten years before the Rule, 12 right whales were seriously injured or killed by vessel strikes.<sup>79</sup> In the ten years after the Rule, eight right whales were seriously injured or killed by vessel strikes.<sup>80</sup> 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.<sup>81</sup> 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.

Benefits this small—statistically nonexistent—are easily outweighed by even the slightest harm. Yet the harms are huge. NMFS estimates that the Rule’s economic cost is between \$30 and \$40 million per year.<sup>82</sup> At best, then, the Rule cost \$300 million to prevent *four* vessel strikes that seriously injured or killed right whales and still increased the number of vessel strikes by seven. No sensible person considers that a good trade. That alone is reason enough for the Rule’s rescission.

But the Rule inflicts 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.<sup>83</sup> These kinds of costs cannot be quantified. Yet they are precious and certainly outweigh the marginal (at best) benefits produced by the Rule.

#### **IV. Rescinding the Rule is consistent with the President’s directives to eliminate unlawful regulation in expedited fashion.**

##### **A. Rescinding the Rule is consistent with and furthers Executive Order 14219 and Executive Order 14192 directing deregulation.**

The Administration has taken multiple actions directing the repeal of regulations. The first is Executive Order 14219, *Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative*, issued on February 19, 2025, which works in tandem with Executive Order 14192, *Unleashing Prosperity Through*

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<sup>78</sup> NMFS, “North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment,” (2020 Rule Assessment), <https://perma.cc/G8NK-9ZHB>, at i.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 23.

<sup>82</sup> *Id.*

<sup>83</sup> In fact, adherence to the Rule creates dangers of its own. The very slow required speed can cause its own safety concerns, including an increased risk of capsizing or swamping. It can be difficult or impossible to keep a large vessel at the required 10-knot speed when traveling downwind. And the slow speed restricts both visibility and maneuverability, which can be especially critical during sudden weather changes that might require boaters to return to port quickly.

*Deregulation*, issued on January 31, 2025. Combined, these EOs establish that all agencies must take significant actions to achieve deregulatory reform.

EO 14219 directs agencies to “commence the deconstruction of the overbearing and burdensome administrative state.” Agency heads must review all regulations within their jurisdiction and identify those that fall under certain classifications. Agencies are to flag regulations that fall under any of these umbrellas to OIRA for rescission or modification.

EO 14219 covers five categories of regulations, the first two of which bear directly on the unlawfulness of the Rule. EO 14219 directs the rescission of rules (1) that are not based on “the best reading” of the underlying statutory authority; or (2) that implicate matters of “social, political, or economic significance” and are not authorized by “clear” statutory authority. The Vessel Speed Rule straddles these; it is not authorized by statute and it regulates the major American business and pastime of fishing.

EO 14219 included three other categories of rules it requires agencies to rescind, all of which further support the rescission of the Rule even if NMFS determines it is lawful. EO 14219 directs the rescission of rules that (1) impose “significant costs” on private parties that are not outweighed by public benefits; (2) impede “technological innovation”; or (3) that impose “undue burdens on small business” or impede “private entrepreneurship.” As explained throughout this comment, the Rule does all three. It imposes significant costs on boaters and fishermen without any tangible benefit, it impedes technological innovation that would keep both whales and boaters safer, and it strains small businesses and impedes private entrepreneurs. SLF represents four individuals who have direct knowledge of the costs and undue burdens of the Rule: Alan Eason, John Moisson, Paul Sistare, and Keeley Megarity. Paul, John, and Alan each paid more than \$10,000 in fines under the Rule, and Keeley has been forced by the Rule to limit his enjoyment of the oceans rather than risk incurring the same fines. Not one of these individuals harmed—or even saw—a right whale on their journey that incurred the fine.

The October 21, 2025, OIRA memorandum shows that OIRA is not satisfied with the pace of deregulation. And given OIRA’s emphasis on time being of the essence, NOAA’s lack of response to SLF’s November 1, 2024, petition to date is both surprising and concerning. OIRA’s memorandum reminds agencies—again—of the EOs directing agencies to engage in deregulatory actions, and to consider waiving notice and comment for facially unlawful regulations like the Vessel Speed Rule. It notes the importance of not setting the bar so high as to render the President’s orders a nullity. Repealing a regulation only if a court has declared it to be unlawful is an example of setting the bar too high. Agencies must repeal all regulations inconsistent with the “single, best meaning of the statute,” even if a court has not struck the regulation. The President has directed agencies to perform their own independent analysis of the legality of their regulations.

Finally, we note that if one were to challenge the rescission 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, OIRA memo, direct and immediate rescission under the APA’s “good cause” exception is appropriate.

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

As SLF detailed in its December 15, 2025, comments in response to NOAA’s request for recommendations for *Restoring American Seafood Competitiveness*,<sup>84</sup> EO 14276 aims to position the U.S. as the “world’s dominant seafood leader”<sup>85</sup> —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 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.<sup>86</sup> 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 actually heightens the risk to 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.

**V. Amendment or repeal promotes NOAA’s priorities.**

Rescission or amendment with adoption of a technology-based approach aligns well with NOAA’s priorities in many ways:

- **Innovation:** NOAA has long touted its commitment to pioneering innovation.<sup>87</sup> A revised approach that embraces technology will once again demonstrate that NOAA is

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<sup>84</sup> See SLF Comment in Response to NMFS’s Request for Recommendations for Restoring American Seafood Competitiveness (Dec. 15, 2025), available at <https://perma.cc/DUR7-X9VA>.

<sup>85</sup> 90 Fed. Reg. at 16,993.

<sup>86</sup> *Id.* (calling for the elimination of unfair trade practices and the leveling of “the unfair playing field that has benefitted foreign fishing companies”).

<sup>87</sup> NMFS, “Our mission, values and vision,” (NMFS Mission Statement), <https://perma.cc/YKD5-DXEV>.

an agency with a long and proud history of advancing its mission through groundbreaking achievements and in partnership with private organizations.

- **Economic Development:** This approach can potentially minimize disruptions to maritime activities by only imposing speed restrictions when necessary, thereby supporting economic activities while maintaining environmental protections. This balance is crucial for advancing NOAA’s goal of promoting economic development alongside environmental stewardship.<sup>88</sup>
- **Climate Resilience and Environmental Stewardship:** Requiring vessels to reduce speed only upon receiving notice of a NARW in the area enhances the protection of these endangered whales. This directly supports NOAA’s goal of promoting environmental stewardship and building climate resilience.<sup>89</sup>
- **Sharing knowledge with others:** This approach would give boaters real time data through cutting edge technology through a NOAA service. This would be useful to the nation’s businesses, communities and people’s daily lives, not just as they travel by regulated boat, but also in the public, private and academic sectors.<sup>90</sup> Because the Vessel Speed Rule does not gather or disseminate data, it does not advance the stated goal of NOAA to share knowledge and information with others.
- **Reduced Operational Costs:** Vessels would only need to slow down when a NARW is detected in the area, rather than adhering to a blanket speed restriction for several months. This can significantly reduce fuel consumption and associated costs.<sup>91</sup>
- **Minimized Delays:** By targeting speed restrictions to specific times and locations, vessels can maintain higher speeds when whales are not present, reducing transit times and improving overall efficiency.<sup>92</sup>
- **Improved Whale Protection:** Real-time data allows for more precise and timely interventions, potentially increasing the effectiveness of measures to protect North Atlantic right whales. This targeted approach can better prevent collisions, directly supporting conservation efforts.<sup>93</sup>

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<sup>88</sup> NMFS, “NOAA FY22-26 Strategic Plan,” <https://perma.cc/T4HR-CUGL>.

<sup>89</sup> *Id.*

<sup>90</sup> NMFS Mission Statement.

<sup>91</sup> Industrial Economics, Incorporated, “Economic Analysis of the North Atlantic Right Whale Vessel Speed Restriction Rule,” (March 2020), <https://perma.cc/FZ2Q-KSAZ>.

<sup>92</sup> *Id.*

<sup>93</sup> NMFS, “North Atlantic Right Whale Speed Zone Dashboard,” <https://perma.cc/LL53-7BUG>.

- **Stakeholder Support:** A more dynamic and responsive system can garner greater support from stakeholders, including shipping companies and conservation groups, by demonstrating a commitment to both economic and environmental priorities.<sup>94</sup>
- **Data-Driven Decision Making:** This method leverages real-time data to inform vessel speed regulations, ensuring that actions are taken based on the latest information about whale locations. This aligns with NOAA’s emphasis on using enhanced science, data, and observational capacity to support decision-making.<sup>95</sup>

This change would make the regulation more dynamic and responsive, better aligning with NOAA’s strategic priorities of innovation, climate resilience, data-driven decision-making, and sustainable economic development.

### 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 for rescission due to its direct conflict with *Michigan v. EPA* and *Ohio v. EPA*. And since SLF’s primary argument is purely legal and consistent with this administration’s emphasis on time being of the essence in rescinding facially illegal rules, we respectfully remind you of SLF’s November 1, 2024, petition for expedited rescission and request that you move directly to an interim final rule and address any further notice and comment later.

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 urge NOAA to move on an expedited basis and 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

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<sup>94</sup> *Cf. id.*

<sup>95</sup> NMFS, “NOAA’s FY 2025 budget request supports Biden-Harris Administration goals,” (March 12, 2024), <https://perma.cc/3MZQ-VWTH>.