

**DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service**

In re NMFS Rule imposing Vessel Speed)
Restriction)
50 C.F.R. § 224.105)

PETITION TO AMEND OR REPEAL

**Southeastern Legal Foundation, Keeley Megarity, Paul Sistare,
Alan Eason, and John Moisson**

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TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF INTEREST OF PETITIONERS	2
BACKGROUND	5
I. The Western North Atlantic right whale	5
II. The Vessel Speed Restriction Rule	6
III. The Rule’s poor results.....	7
ARGUMENT.....	9
I. Technology provides the better, more effective solution	9
II. NMFS lacked statutory authority to issue the Vessel Speed Restriction Rule.....	14
A. Legal framework and background.....	14
B. NMFS lacked statutory authority to issue the Rule	16
III. The broad, undefined power NMFS claims that permits it to enact any regulation it wants to protect NARWs violates the nondelegation doctrine.....	19
IV. Amendment or repeal promotes NOAA’s priorities.....	19
V. The Proposal	21
CONCLUSION	24

INTRODUCTION

Under the Administrative Procedure Act, 5 U.S.C. § 553(e), the Petitioners named above hereby petition the Agency to amend its ill-advised rule setting a 10-knot seasonal speed limit for boats 65 feet and over in seasonal zones on the Atlantic Coast that is found at 50 C.F.R. § 224.105 (the Vessel Speed Restriction Rule or Rule). The Rule imposes unreasonable costs, given advances in technology that have better equipped boats to avoid striking whales. Further, the Rule has always lacked authority and threatens the constitutional guarantee of separation of powers.

If the Vessel Speed Restriction Rule was ever sound policy, it no longer is, due to developments in technology. These include:

- **Advanced, common detection systems**
- **Marine radar**
- **Thermal imaging systems**
- **Satellite tagging**
- **Acoustic buoys**

In any event, Congress never granted the National Marine Fisheries Service (NMFS) statutory authority to enact the Vessel Speed Reduction Rule under the relevant statutory provisions. NMFS invokes general “gap filler” language that authorizes it to enact necessary or appropriate regulations—nothing like the broad and specific support it would need to authorize a rule of this magnitude that turns ordinary mariners into criminals for innocently operating their vessels at a normal (and safe) speed. Indeed, NMFS itself disclaimed this power as it fought for more authority to regulate vessel strikes. The idea that such vague language would confer such awesome power upon NMFS has no limit. NMFS could enact any rule no matter how intrusive or burdensome, so long as the Secretary of Commerce thought it had some tendency to protect a marine mammal. Fortunately, though, Congress did not obliquely confer such mighty power to the Secretary, as basic

principles of statutory interpretation easily demonstrate. If the Rule actually has statutory support, then that statute is so broad and standardless that it is invalid under the nondelegation doctrine.

An amended rule, or full repeal, and a full-scale adoption of technology should be done on an **expedited basis** to ensure the survival of the species and promote NOAA’s role as an innovator and collaborator.

STATEMENT OF INTEREST OF PETITIONERS

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center based on Roswell, Georgia, that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF fights to protect individual rights and to preserve the constitutional framework established to protect those rights against regulatory overreach. This aspect of its advocacy is reflected in its regular representation of those challenging agency overreach and other governmental violations of the constitutional framework.¹ SLF also regularly files amicus curiae briefs with the Supreme Court about issues of agency overreach and deference.²

SLF defends the Constitution by asserting legal constraints on the administrative state. Although this Nation was founded on principles of representative government and a system of government where the legislative branch has the exclusive power of legislation,³ Americans today

¹ See, e.g., *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) (*UARG*); *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 583 U.S. 109 (2018).

² See, e.g., *Kisor v. Wilkie*, 588 U.S. 558 (2019); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

³ 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) (quotation omitted).

are used to a different sort of government—one that the Nation’s founders took great steps to prevent. The administrative state, by which the lawmaking function has been assigned to the executive branch, 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.

In *UARG*, 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.”⁴ In language that seems strangely appropriate given the current subject at hand, the Court concluded 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.⁵

Lately, SLF has watched with increasing alarm as NMFS, through the National Oceanic and Atmospheric Administration (NOAA), has exhibited the worst tendencies of an unconstrained agency, un beholden to 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 Mexico and a 10-knot boat speed limit to protect Rice’s whales in their core habitat areas off the Florida gulf (Rice’s whale petition)⁶—an alarm NMFS wisely heeded. SLF also filed amicus briefs opposing NMFS’s claims that its statutory interpretations were entitled to deference.⁷ And lately NMFS has aggressively begun to enforce the Vessel Speed Restriction, 50 C.F.R. § 224.105, threatening innocent boaters with criminal penalties and forcing them to pay crippling fines to avoid criminal prosecution.

⁴ *UARG*, 573 U.S. at 328.

⁵ *Id.*

⁶ See 88 Fed. Reg. 20,846.

⁷ See *Loper Bright*, 144 S. Ct. 2244.

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 parties *pro bono*.

SLF, alongside four other petitioners, now sounds the alarm again. Keeley Megarity is the owner of C-Student, a 72-foot Viking boat that ports in Southside Place, Texas. He fishes throughout the Gulf of Mexico and Atlantic Coast, including in places and times when the Vessel Speed Restriction Rule is effective. Mr. Megarity is a member of the Houston Big Game Fishing Club (HBGFC). Last year, the C-Student took third prize overall in HBGFC's top private boat of the year award. Mr. Megarity resides in Houston, Texas.

Paul Sistare is the owner of the M/V Southern Joy, a 70-foot boat that ports in Fort Lauderdale, Florida. He received a Notice of Violations and Assessment (NOVA) for violating the Vessel Speed Restriction Rule on March 22 and April 2, 2023. The 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 Restriction 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.

John Moisson is the co-owner of the M/V Rumours. He was penalized along with Mr. Eason for violating the Vessel Speed Restriction Rule. The M/V Rumours ports in Naples, Florida. Mr. Moisson resides in Naples, Florida.

Through this Petition, SLF encourages NMFS to reexamine one of its most far-reaching assertions of regulatory power. SLF respectfully suggests that NMFS amend or repeal the Vessel Speed Restriction Rule, 50 C.F.R. § 224.105, for the reasons below. Such a rule would fail to withstand judicial scrutiny now that judicial independence has been restored when determining the scope of an agency's powers.⁸

SLF, Mr. Megarity, Mr. Sistare, Mr. Eason, and Mr. Moisson are "interested" parties concerning the Vessel Speed Restriction, *see* 5 U.S.C. § 553(e), and hereby petition for amendment or repeal of the Vessel Speed Restriction Rule. Amendment or repeal of the Rule aligns with many of NOAA's priorities, including embracing innovation, collaborating with private partners, and being a leader in the sharing of knowledge.

Petitioners specifically request that NMFS expedite its rulemaking process.

BACKGROUND

I. The Western North Atlantic right whale

The Western North Atlantic right whale (NARW) (*Eubalaena glacialis*) is an endangered species of whales that reside in the waters of the United States. NARWs are a large species of baleen whale, growing to over 60 feet long and weighing more than 230,000 pounds.⁹ Because of

⁸ *See Loper Bright*, 144 S. Ct. at 144 S. Ct. at 2267 ("Congress expects courts to do their ordinary job of interpreting statutes[.]").

⁹ Whale and Dolphin Conservation, "Species guide: North Atlantic right whale," <https://perma.cc/DLK8-TR2F>.

overharvesting during the heyday of whaling, NARWs have long been endangered. In fact, right whales were endangered before the Endangered Species Act (ESA) became law.¹⁰ By 1997, NMFS, through NOAA, estimated that the population stood at 300.¹¹ NMFS currently estimates that there are 338 NARWs, up from fewer than 100 in 1935.¹²

II. The Vessel Speed Restriction Rule

In 2008, NMFS promulgated a final rule designating seasonal speed restrictions for vessels over 65 feet in certain areas of the eastern United States coastline.¹³ The Rule was initially promulgated with a five-year sunset clause and then made permanent in 2013.¹⁴ The Rule’s stated purpose was “to reduce the likelihood of deaths and serious injuries to endangered North Atlantic right whales that result from collisions with ships.”¹⁵

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.¹⁶ 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, except when maritime conditions justify a deviation to safely operate the vessel.¹⁷

¹⁰ See *Ctr. for Biological Diversity v. Raimondo*, 610 F. Supp. 3d 252, 262 (D.D.C. 2022).

¹¹ *Final Recovery Plan for the Northern Right Whale (Eubalaena Glacialis) Revision*, v (NOAA Aug. 2004) (Recovery Plan), <https://perma.cc/CW4K-AUSU>.

¹² NMFS, “NORTH ATLANTIC RIGHT WHALE (*Eubalaena glacialis*): Western Atlantic Stock,” 18–19 (May 2023), <https://perma.cc/2U3B-ESXU> (NARW Stock Assessment).

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

¹⁴ 78 Fed. Reg. 73,726 (Dec. 9, 2013).

¹⁵ *Id.*

¹⁶ 50 C.F.R. § 224.105(a).

¹⁷ *Id.* §§ 224.105(a)(1)-(3), (c).

Violations of NMFS rules are punishable by fines and imprisonment.¹⁸ In 2022 and 2023, NOAA collected \$950,306 in civil penalties for violating this regulations.¹⁹

In addition, NMFS established a program of voluntary slow speed in designated Dynamic Management Areas (DMAs).²⁰ 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.²¹ The DMAs are temporary, lasting for 15 days with a possible 15-day extension if whales are resighted in the same area.²² Mariners are asked, but not required, to avoid these areas altogether or travel through them at no more than ten knots.²³ 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.²⁴

III. The Rule’s poor results

NMFS was required to publish and seek comments on a report evaluating the conservation value and economic and navigational safety impacts of this section, including any recommendations to minimize burden of such impacts no later than January 1, 2019.²⁵ The final report was published

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

¹⁹ NMFS, “North Atlantic Right Whale Speed Zone Dashboard,” <https://perma.cc/LL53-7BUG>.

²⁰ 73 Fed. Reg. 60,180 (Dec. 9, 2008).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ NMFS, “Help Endangered Whales: Slow Down in Slow Zones,” <https://perma.cc/CSU9-XMF6>.

²⁵ 50 C.F.R. § 224.105(d).

in June 2020, and its findings give strong reason to reconsider the Rule’s propriety.²⁶ NMFS found that “it is not possible to determine a direct causal link” between the Rule and reductions in vessel strikes, it laid out the best-case scenario.²⁷ In the ten years before the Rule, 12 NARWs were seriously injured or killed by vessel strikes.²⁸ In the ten years after the Rule, 8 NARWs were seriously injured or killed by vessel strikes.²⁹ Given the sheer number of trips during these periods, it is impossible to draw any conclusions from such a small difference.

And this is not the only cause for concern that NMFS’s report glosses over. In fact, the number of all vessel strikes, including those that did not result in serious injury or death of NARWs, *increased* after the passage of the Rule, from 25 in the ten years prior to 32 in the ten years after.³⁰ And no conclusions can be drawn about how regulating based on the size of a boat threatens NARWs because NMFS did not collect data on the size of the vessels that struck the NARWs, either before or after.

NMFS estimates that the Vessel Speed Restriction Rule’s economic cost is between \$30 and \$40 million per year.³¹ At best, then, the Rule spent \$300 million to prevent 4 vessel strikes on NARWs. One-tenth that much could have done far more to help NARWs. As petitioners explain further below, NMFS should refocus its activities on technological advancements and voluntary cooperation and rescind the arbitrary and ineffective Rule.

²⁶ NMFS, “North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment,” (2020 Rule Assessment), <https://perma.cc/G8NK-9ZHB>.

²⁷ *Id.* at i.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 23.

³¹ *Id.*

ARGUMENT

NMFS should rescind the Vessel Speed Restriction Rule for three reasons. First, it is ineffective and now technological enhancements that offer better risk reduction strategies have displaced the justification for the Rule. Second, the Rule is, and always has been, outside of NMFS's statutory authority. Because NMFS was never authorized to promulgate the Vessel Speed Restriction Rule, it must acknowledge that fact and rescind the Rule. Third, in the extremely unlikely event that Congress really did delegate this power to NMFS, that delegation would violate the constitutional separation of powers, making it unlawful and requiring its rescission.

I. Technology provides the better, more effective solution

A comparison of the regulatory solution embodied by the Vessel Speed Restriction 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 Restriction Rule was effective.³² Another analysis NMFS relied on "found there was no apparent trend up or down in ship strike serious injury and mortality between 2000 and 2017."³³ 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.³⁴ 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.³⁵ That money can be more effectively deployed elsewhere.

³² NARW Stock Assessment, *supra* note 12, at 27.

³³ *Id.*

³⁴ 2020 Rule Assessment, *supra* note 26, at i.

³⁵ *See id.* at 23.

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 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 in the Vessel Speed Restriction Rule: “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.”³⁶ 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 Restriction 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.

The technology capable of giving covered boats the information they need to know the location of a whale already exists.

³⁶ 73 Fed. Reg. at 60,181.

• **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 NARWs. Below are examples of equipment commonly installed on boats today with visual, thermal, and infrared capabilities that can detect NARWs.

- **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 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 similar products are commonly installed on any vessel large enough to be covered by the Vessel Speed Restriction Rule. Because NARWs 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. Radar has been used in biological research to monitor wildlife, such as detecting and tracking fin whales and smaller mammals up to 5.5km or farther away at lower sea states.³⁷ Radar is a fully capable and available tool widely employed by all manner and size of vessels for detecting marine mammals.

³⁷ 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.

- **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.³⁸ While it may be necessary to retag the NARWs on an annual or semi-annual basis, it 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 NARWs.³⁹ 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.⁴⁰

- **Acoustic buoys** – Scientists at Woods Hole Oceanographic Institution have developed acoustic buoys to protect NARWs.⁴¹ 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%

³⁸ 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).

³⁹ 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>.

⁴⁰ Sebastian Richter et al., “Coastal Marine Mammal conservation using thermal imaging-based detection systems,” <https://perma.cc/7CK4-RU79>.

⁴¹ Patrick Whittle, Associated Press, “Robotic buoys developed to keep Atlantic right whales safe,” May 28, 2022, <https://perma.cc/QJ6Q-4GJZ>.

probability of detection for a single call.⁴² This range expands when multiple calls are available. Passive Acoustic Monitoring (PAM) systems, like these buoys, are more reliable than visual surveys for detecting NARWs over daily time scales.⁴³ They can operate continuously, regardless of weather conditions, and provide near real-time data to mariners.

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.⁴⁴ And they are comparatively superior to a speed restriction, which are static and allow boaters to speed in hazardous weather conditions,⁴⁵ because the buoys continuously monitor whale activity, regardless of weather conditions.

Buoys enjoy other comparative advantages. The Vessel Speed Restriction Rule only covers a few zones along the coast during certain seasons.⁴⁶ And it exempts some large crafts and only applies to larger boats.⁴⁷ But whales move and may not follow expected patterns.⁴⁸ Buoys, however,

⁴² 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>.

⁴³ *Id.*

⁴⁴ *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>.

⁴⁵ *See* 50 C.F.R. § 224.105(c).

⁴⁶ *Id.* § 224.105(a)

⁴⁷ *Id.*

⁴⁸ 2020 Rule Assessment, *supra* note 26, 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”).

can be deployed cheaply up and down the coast, tracking whales outside the zones and outside the regulated seasons. They can relay information to all boats, including vessels owned by the United States, or a state law-enforcement entity, or those smaller than 65 feet.

Acoustic buoys are now proven technology. Researchers have deployed a “Whale Safe” system in California.⁴⁹ 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 single strike of an endangered whale of any species has been recorded.⁵⁰

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 is in a very different place.

II. NMFS lacked statutory authority to issue the Vessel Speed Restriction Rule

A. Legal framework and background

Both the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) give NMFS the authority to promulgate regulations to protect threatened and endangered species and marine mammals from harm. But these statutes do not authorize NMFS to restrict vessel speeds to protect accidental injuries to these species as it did in the Vessel Speed Restriction Rule.

Congress enacted the MMPA in 1972. Declaring that marine mammals are resources of aesthetic, recreational, and economic significance, Congress passed the MMPA to protect marine

⁴⁹ Daniel Hentz, Woods Hole Oceanographic Institute, “Whale Safe,” October 19, 2021, <https://perma.cc/MUX7-9GUQ>.

⁵⁰ *Mutual of Omaha’s Wild Kingdom Protecting the Wild: Safe Passage for Whales* (NBC television broadcast, Oct. 12, 2024).

mammals and encouraged to the greatest extent feasible commensurate with sound resource management policies, and with the primary objective of their management to maintain the health and stability of the marine ecosystem.⁵¹

Enacted in 1973, the ESA is a statutory scheme designed to protect endangered and threatened species and conserve the habitats on which they depend.⁵² The central purpose of the ESA is to recover species until ESA protections are no longer necessary.⁵³

When NMFS enacted the Vessel Speed Restriction Rule, it relied on the general grant of rulemaking authority found in Section 112(a) of the MMPA, and Section 11(f) of the ESA.⁵⁴ 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.⁵⁵ Under Section 11(f), the Secretary of Commerce is authorized to issue regulations “as may be appropriate to enforce” the ESA.⁵⁶

Section 112(a) is not the only source of rulemaking authority under the MMPA, however, even if it was the one NMFS relied on. The MMPA also gives the Secretary of Commerce the authority to issue regulations on the “taking” of marine mammals as she “deems necessary and appropriate[.]”.⁵⁷ “Take” is defined under the MMPA to mean harass, hunt, capture, or kill, or

⁵¹ 16 U.S.C. § 1561.

⁵² 16 U.S.C. § 1531(b).

⁵³ 16 U.S.C. §§ 1531(b), 1532(3).

⁵⁴ *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).

⁵⁵ 16 U.S.C. § 1382(a).

⁵⁶ 16 U.S.C. § 1540(f).

⁵⁷ 16 U.S.C. § 1373(a)

attempt to harass, hunt, capture, or kill any marine mammal.⁵⁸ To issue takings regulations, the Secretary must first consult five statutorily required factors.⁵⁹

B. NMFS lacked statutory authority to issue the Rule

NMFS lacks the authority under general rulemaking authority such as Section 112(a) or Section 11(f) to invent the power to create a high seas speed limit.

An agency may only exercise powers granted to it by Congress.⁶⁰ The question of “whether Congress in fact meant to confer the power the agency has asserted” is shaped by the nature of the action taken.⁶¹ Some claims of power demand “clear evidence that the agency is authorized to regulate in the manner it proposes.”⁶² At root, “[a]gencies may play the sorcerer’s apprentice but not the sorcerer himself.”⁶³

This power was not delegated. NMFS spent years lobbying Congress to give it the power it used to enact the Vessel Speed Restriction Rule, and it failed repeatedly. In fact, NMFS and its witnesses testified that NMFS could not enact a rule like this one unless Congress expanded the agency’s power in 2003 hearings debating the MMPA.⁶⁴ They said so repeatedly:

⁵⁸ 16 U.S.C. § 1540(f).

⁵⁹ *Id.*

⁶⁰ *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

⁶¹ *West Virginia*, 597 U.S. at 721 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

⁶² *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023) (quoting *Bond v. United States*, 572 U.S. 844, 857 (2014)).

⁶³ *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

⁶⁴ *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).

- 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) (“[T]he 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 Lent) (ship strikes are “leading source of mortality” for right whales; proposed bill “would authorize” the use of the MMPA to reduce the occurrence of ship strikes);
- *Id.* at 36 (statement of Cottingham) (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 (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”).

This fact comes coupled with the fact that the language NMFS used to enact the Vessel Speed Restriction Rule is just a general grant of powers.

The text of the ESA and MMPA does not confer this power. NMFS relies on provisions that say nothing about speed limits.⁶⁵ At most, the MMPA and ESA contain “textual dead zone[s]”;

⁶⁵ *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454, 456 (5th Cir. 2020) (“The Act neither says nor suggests that the agency may regulate . . .”).

silence that NMFS may not treat “as a mere ‘gap’ for it to fill.”⁶⁶ But NMFS chose to rely on this thin reed of authority that was never designed to bear such weight.

Under ordinary rules of statutory interpretation, the Rule is not a valid exercise of rulemaking authority under Section 112(a). Congress specifically gave separate regulatory authority to prohibit injuring marine mammals through takings regulations under Section 103.⁶⁷ It would violate the general/specific canon if NMFS could also regulate the same activity through Section 112(a).⁶⁸ Section 112(a) is a general grant of authority.⁶⁹ Congress did not set aside a place for takings regulations and then generally authorize them through a general, more broad provision. Under that interpretation, the “specific statute” would be “nullified by a general one.”⁷⁰

NMFS could effectively “nullify” congressionally mandated constraints on its ability to enact takings regulations. Congress placed important constraints governing takings regulations under Section 103.⁷¹ This careful balancing of interests set forth by the statute cannot be avoided. But avoiding these limits is what NMFS did.

⁶⁶ See *id.* at 460 (discussing similar language under Magnuson-Stevens Fishery Conservation and Management Act); see also *Coastal Fisheries*, 76 F.4th at 302 (“[E]xpansive, vaguely worded definition is not akin to clear congressional authorization.”).

⁶⁷ 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.

⁶⁸ 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) (more specific provision controls over a general provision).

⁶⁹ See 16 U.S.C. § 1382(a).

⁷⁰ *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)).

⁷¹ See 16 U.S.C. § 1373(b) (prescribing five factors for consideration, including economic and

III. 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 Restriction 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.⁷² If that means coastal speed limits, then the two laws contain a “total absence of guidance” that provide any kind of limitations upon regulations that carry serious criminal and civil penalties.⁷³ This guidance can only come from Congress; NMFS cannot supply its own intelligible principle.

IV. Amendment or repeal promotes NOAA’s priorities

Adopting a technology-based approach aligns well with NOAA’s priorities in many ways:

- **Innovation:** NOAA has long touted its commitment to pioneering innovation.⁷⁴ A revised approach that embraces technology will once again demonstrate that NOAA is 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

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).

⁷² See 16 U.S.C. §§ 1373(a), 1540(f).

⁷³ See *Jarkesy*, 34 F.4th at 462, *aff’d on diff. grounds*, 144 S. Ct. 2117 (2024).

⁷⁴ NMFS, “Our mission, values and vision,” (NMFS Mission Statement), <https://perma.cc/YKD5-DXEV>.

for advancing NOAA's goal of promoting economic development alongside environmental stewardship.⁷⁵

- **Climate Resilience and Environmental Stewardship:** By requiring vessels to reduce speed upon receiving notice of a NARW in the area, this approach enhances the protection of these endangered whales. This directly supports NOAA's goal of promoting environmental stewardship and building climate resilience.⁷⁶
- **Equity and Inclusion:** By focusing on real-time notifications, this approach can be more inclusive and equitable, as it allows for adaptive management that can address the needs of various stakeholders, including those in underserved communities who rely on marine resources.⁷⁷
- **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.⁷⁸ Because the Vessel Speed Restriction 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.⁷⁹
- **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.⁸⁰
- **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.⁸¹

⁷⁵ NMFS, "NOAA FY22-26 Strategic Plan," <https://perma.cc/T4HR-CUGL>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ NMFS Mission Statement.

⁷⁹ Industrial Economics, Incorporated, "Economic Analysis of the North Atlantic Right Whale Vessel Speed Restriction Rule," (March 2020), <https://perma.cc/FZ2Q-KSAZ>.

⁸⁰ *Id.*

⁸¹ 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.⁸²
- **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.⁸³

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, equity, and sustainable economic development.

V. The Proposal

NMFS should either amend the Vessel Speed Restriction Rule or repeal it outright. The Rule could be amended to reflect that technological solutions better protect NARWs at far less cost. An amendment could accomplish this by requiring regulated, underequipped boats to slow down to ten knots upon notification from NMFS that a right whale is in the area.

Although Petitioners are not legally required to submit proposed regulatory language, they do so here to demonstrate how easily a better regulation can be drafted. Regardless of whether NMFS opts to adopt some or all of this proposed language, it must conclude the petitioned action within a reasonable time. Here, however, Petitioners have specifically requested that NMFS act on an expedited basis.

Petitioners first propose that NMFS simply rescind the entire Rule as it is beyond NMFS’s statutory authority and, even if it were not, the Rule is ineffective, unnecessary, and wasteful.

⁸² *Cf. id.*

⁸³ NMFS, “NOAA’s FY 2025 budget request supports Biden-Harris Administration goals,” (March 12, 2024), <https://perma.cc/3MZQ-VWTH>.

Because it is self-evidently true that no boater would choose to strike a whale or any other large object if they can help it, it can be assumed that they will safely heed the warnings offered by the new technology and avoid it without a regulatory requirement. This would be done at no cost and to the enormous benefit of human freedom.

In the alternative, Petitioner proposes that 50 C.F.R. § 224.105(a) be revised to instead implement a system of slowdown areas based on recent NARW sightings:

- (a) The following restrictions apply to: All vessels greater than or equal to 65 ft (19.8 m) in overall length and subject to the jurisdiction of the United States, and all other vessels greater than or equal to 65 ft (19.8 m) in overall length entering or departing a port or place subject to the jurisdiction of the United States. These restrictions shall not apply to U.S. vessels owned or operated by, or under contract to, the Federal Government. This exemption extends to foreign sovereign vessels when they are engaging in joint exercises with the U.S. Department of the Navy. In addition, these restrictions do not apply to law enforcement vessels of a State, or political subdivision thereof, when engaged in law enforcement or search and rescue duties. When a North Atlantic right whale is sighted within one of the below-delineated areas, NMFS shall issue a slowdown advisory for the area. NMFS shall rescind a slowdown advisory for an area when (1) all sighted North Atlantic right whales in an area are known to have left the area; or (2) sufficient time has passed without further sighting within the area such that the risk of vessel strike to a North Atlantic right whale is insufficient to justify the continued advisory. A vessel within an area that is under a slowdown advisory shall travel slower than ten knots above ground while within the area, subject to the exceptions in subsections (c) and (d).

(1) Southeast U.S. (south of St. Augustine, FL to north of Brunswick, GA): The area is bounded by the following coordinates: Beginning at 31°27'00.0" N-080°51'36.0" W; thence west to charted mean high water line then south along charted mean high water line and inshore limits of COLREGS limit to a latitude of 29°45'00.0" N; thence east to 29°45'00.0" N-080°51'36.0" W; thence back to starting point.

(2) Mid-Atlantic U.S. (from north of Brunswick, Georgia to Rhode Island): The area is bounded by the following coordinates:

- (i) In the area bounded by the following: 33°56'42.0" N-077°31'30.0" W; thence along a NW bearing of 313.26° True to charted mean high water line then south along mean high water line and inshore limits of COLREGS limit to a latitude of 31°27'00.0" N; thence east to 31°27'00.0" N-080°51'36.0" W; thence to 31°50'00.0" N-080°33'12.0" W; thence to 32°59'06.0" N-078°50'18.0" W; thence to 33°28'24.0" N-078°32'30.0" W; thence to 33°36'30.0" N-077°47'06.0" W; thence back to starting point.

(ii) Within a 20-nm (37 km) radius (as measured seaward from COLREGS delineated coast lines and the center point of the port entrance) at the:

(A) Ports of New York/New Jersey: 40°29'42.2" N-073°55'57.6" W;

(B) Delaware Bay (Ports of Philadelphia and Wilmington): 38°52'27.4" N-075°01'32.1" W; and

(C) Entrance to the Chesapeake Bay (Ports of Hampton Roads and Baltimore): 37°00'36.9" N-075°57'50.5" W; and

(D) Ports of Morehead City and Beaufort, NC: 34°41'32.0" N-076°40'08.3" W.

(iii) In Block Island Sound, in the area bounded by the following coordinates: Beginning at 40°51'53.7" N-70°36'44.9" W; thence to 41°20'14.1" N-70°49'44.1" W; thence to 41°04'16.7" N-71°51'21.0" W; thence to 40°35'56.5" N-71°38'25.1" W; thence back to starting point.

(3) Northeast U.S. (north of Rhode Island):

(i) In Cape Cod Bay, MA: The area bounded by the following coordinates 42°04'56.5" N-070°12'00.0" W; thence north to 42°12'00.0" N-070°12'00.0" W; thence due west to charted mean high water line; thence along charted mean high water within Cape Cod Bay back to beginning point.

(ii) Off Race Point: The area bounded by straight lines connecting the following points in the order stated: 42°30'00.0" N-069°45'00.0" W; thence to 42°30'00.0" N-070°30'00.0" W; thence to 42°12'00.0" N-070°30'00.0" W; thence to 42°12'00.0" N-070°12'00.0" W; thence to 42°04'56.5" N-070°12'00.0" W; thence along charted mean high water line and inshore limits of COLREGS limit to a latitude of 41°40'00.0" N; thence due east to 41°41'00.0" N-069°45'00.0" W; thence back to starting point.

(iii) Great South Channel: The area is all waters bounded by straight lines connecting the following points in the order stated:

42°30'00.0" N-069°45'00.0" W

41°40'00.0" N-069°45'00.0" W

41°00'00.0" N-069°05'00.0" W

42°09'00.0" N-067°08'24.0" W

42°30'00.0" N-067°27'00.0" W

42°30'00.0" N-069°45'00.0" W

The agency should leave subsections (b) and (c) intake, making only revisions necessary to accommodate other changes. Petitioners would also request the addition of subsection (d), as follows:

(d) A vessel otherwise covered by this section is exempted from the advised ten knot speed and may instead travel at any safe speed if the vessel is equipped with approved marine radar or

other detection systems such that the risk of injury to North Atlantic right whales is insufficient to justify the speed reduction. The Secretary shall publish separately a list of required specifications for approved marine radar or other detection systems.

CONCLUSION

Accordingly, pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), Petitioners petition the Secretary of Commerce, acting through NMFS, to amend or rescind the regulation that adopted the Vessel Speed Restriction Rule and to do so on an **expedited basis**. The proposed rescission would not harm NARWs, would put NMFS into compliance with the law, 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 Restriction Rule is not an effective or reasonable method of achieving the stated policy goals considering technological advancement and the success of voluntary, cooperative measures. Petitioners respectfully request that NMFS amend or rescind it.