

**Before the
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

COMMENTS

of

THE NATIONAL MARINE MANUFACTURERS ASSOCIATION

on the

**NOAA/NMFS Proposed Amendments to the
North Atlantic Right Whale Vessel Strike Reduction Rule
NOAA-NMFS-2022-0022**

Frank Hugelmeyer
President & CEO
Tillie Fowler
Senior Vice President, Government
Relations & Regulatory Affairs
National Marine Manufacturers
Association

Counsel
Ronald M. Jacobs
Margaret K. Fawal
Aaron J. Aber
Christina L. Lara
Venable LLP
600 Massachusetts Avenue, N.W.
Washington, D.C. 20001

October 31, 2022

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

INTRODUCTION AND SUMMARY 1

DISCUSSION 4

 I. NMFS has not engaged in rational decision making in promulgating the Proposal..... 4

 A. NMFS relies on incomplete data and thus overstates the risk of whale strikes by smaller vessels. 4

 B. NMFS draws conclusions unsupported by the data before the Agency..... 6

 II. The EA conducted by NMFS does not meet the Agency’s NEPA obligations..... 8

 A. NFMS should prepare an EIS because the Agency grossly underestimates the proposal’s recreation and economic impacts..... 9

 B. NMFS failed to adequately consider alternatives to the proposed action.11

 III. NMFS was required to consult with the USCG before issuing the proposal.12

 A. USCG is Charged with Enforcing the MMPA.12

 B. Rather than Expanding the Scope of the 2008 Speed Rule, NMFS Should Focus on Improving Compliance of and Enforcement over Large Vessels.....15

 C. The USCG is charged with issuing regulations regarding the safe design and operation of vessels.16

 IV. The Economic Impact Analysis is Deficient and Understates Economic Impacts.....19

 V. The Proposal Raises Serious Constitutional Concerns.....21

 A. The Enormous Scope of the Speed Rule Implicates both the Major Question and Non-Delegation Doctrines21

 B. The Proposed Rule Would Effectuate the Regulatory Taking of Boats Everywhere.....22

 C. The Fourth Amendment Presents Serious Limitations on the Use of Transponders to Enforce the Proposed Rule.23

CONCLUSION24

INTRODUCTION AND SUMMARY

The National Marine Manufacturers Association (“NMMA”)¹ submits these comments in response to the National Marine Fisheries Service, National Oceanic and Atmospheric Administration’s (“NMFS” / “NOAA”) proposed rulemaking to amend the North Atlantic right whale vessel speed regulations at 50 C.F.R. Part 224 (the “Proposal”).² NMMA of course supports efforts to protect the right whale and welcomes NMFS’s engagement in this important area. What NMFS has proposed, however, drastically underestimates the effects on boaters without sound scientific evidence that what it proposes will actually protect right whales.

In this rulemaking, NMFS proposes to (1) modify the spatial and temporal boundaries of current speed restriction areas (referred to as Seasonal Management Areas (“SMAs”)), (2) include most vessels between 35 feet (10.7 m) and 65 feet (19.8 m) in length (referred to herein as “smaller vessels”) in the size class subject to speed restrictions, (3) create a Dynamic Speed Zone framework to implement mandatory speed restrictions when whales are known to be present outside active SMAs, and (4) update the speed rule’s safety deviation provision. These proposed changes represent a drastic expansion of the existing vessel speed regulations promulgated in 2008 (the “Vessel Speed Rule”), both with respect to the areas in which the speed restrictions apply and to the universe of vessels regulated. While NMMA supports NMFS’s goal of reducing right whale mortality events, it strongly opposes these proposed measures. The data gaps and analytical errors underpinning NMFS’s proposal seriously call into question the Agency’s conclusions that smaller vessels pose a significant risk to right whales in the first instance. And when considering the severe detrimental economic impacts these proposed changes will have on the recreational boating industry (impacts that NMFS has significantly understated), it is clear that NMFS should seriously reconsider the Proposal entirely.

The Proposal’s problems are clear: an increase in right whale mortality has been identified, but the source of this increase remains unknown. Instead of ascertaining the exact cause of increased right whale mortality, NMFS has instead proposed a blunt and sweeping rule that will have extraordinary negative consequences on the fishing and recreational boating industries as well as the businesses and communities that rely on them. Yet, the

¹ NMMA is the leading trade organization for the North American recreational boating industry. NMMA member companies produce more than 80 percent of the boats, engines, trailers, marine accessories and gear used by millions of boaters in North America. The association serves its members and their sales and service networks by improving the business environment for recreational boating including providing domestic and international sales and marketing opportunities, reducing unnecessary government regulation, decreasing the cost of doing business, and helping grow boating participation. As the largest producer of boat and sport shows in the U.S., NMMA connects the recreational boating industry with the boating consumer year-round. Learn more at www.nmma.org.

² “Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule,” 87 Fed. Reg. 46,921 (Aug. 1, 2022) (to be codified at 50 C.F.R. Part 224).

Proposal is unlikely to address the underlying problem and at the very least, its effectiveness is unsupported by the evidence and data.

NOAA acknowledges that various factors have contributed to the increase in right whale mortality, from entanglement in fishing gear to climate change, which may increase food scarcity and thus shift migratory patterns. And while large vessel strikes pose significant risks to the right whale, there is—at best—insufficient data supporting the conclusion that small vessels are responsible for the uptick in right whale mortality. NOAA lacks convincing autopsy data on right whale remains, leaving the cause of many right whale deaths unknown. As such, the possibility that vessels have struck already-deceased whales cannot be ruled out, and there is scant evidence linking particular mortality events to vessels of particular sizes.

NMFS should, at a minimum, conduct adequate investigations and coordinate with all parties affected by the Proposal, including other federal agencies and public stakeholders like the recreational fishing and boating industries. Such rigorous investigation and stakeholder engagement is certainly not beyond the scope of NOAA’s capabilities. When NOAA saw an increase in manatee mortality, it conducted a thorough analysis to determine the cause of these deaths and the appropriate remedies.³ And as recently as October 2022, NMFS and the United States Department of the Interior released a draft strategy for engaging the public and ocean users on a plan to bolster offshore wind development while simultaneously recovering the population of right whales. Specifically, the plan aims to leverage the expertise of, and ensure coordination among, all affected federal agencies as well as stakeholders such as the offshore wind industry.⁴

The recreational boating industry alone generates \$170.3 billion annually, and supports more than 35,000 businesses and 691,000 jobs.⁵ As NOAA itself recognizes, the commercial and recreational fishing industry is responsible for 1.8 million jobs, \$255 billion in sales, and \$117 billion in value added impacts.⁶ Thus, given the magnitude of potential impacts on the recreational fishing and boating industries, it is critical that NMFS works to ensure that protection of the right whale can proceed in tandem with flourishing recreational

³ Manatee Mortality Event Along the East Coast: 2020-2022, Florida Fish and Wildlife Conservation Commission, <https://myfwc.com/research/manatee/rescue-mortality-response/ume/> (describing the joint investigation between NOAA Fisheries and Florida Fish and Wildlife Conservation Commission into the high level of manatee mortalities along the Atlantic coast of Florida).

⁴ Heather Richards, *Interior, NOAA ink right whale and offshore wind strategy*, E&E News (Oct. 21, 2022), <https://www.eenews.net/articles/interior-noaa-ink-right-whale-and-offshore-wind-strategy/>.

⁵ NMMA, *Recreational Boating, Key Recreational Boating Industry Facts*, <https://www.nmma.org/advocacy/economic-impact/recreational-boating> (last accessed Oct. 29, 2022).

⁶*Id.*

fishing and boating industries, all represented by individuals who also care deeply about nurturing marine ecosystems and protecting the right whale.

Perhaps the Proposal's most critical flaw is the failure of the Agency to properly consult with the United States Coast Guard ("USCG") or any engineers and manufacturers of small vessels, all of whom are familiar with the necessary safety considerations for small vessel operators. Even NOAA acknowledges that while small vessels pose a risk to right whale mortality, the corollary is also true: right whale collisions with small vessels pose an equally significant risk to human life. As currently drafted, the Proposal withdraws much authority from the small vessel operators charged with ensuring the safety of all onboard passengers, forcing operators to transit at potentially unsafe speeds or risk breaking federal law unless a narrow and limited exception applies. NMFS must, at minimum, consult with experts on small vessel design and operation to ensure the Proposal does not pose a safety risk to human life.

Moreover, the Proposal raises a series of constitutional issues that NMFS must address. First, it is not clear that NMFS possesses the statutory authority to issue such a sweeping rule in the first place. 16 U.S.C. § 1382(a) grants NMFS the authority to promulgate regulations that are "necessary and appropriate" to effectuate the goals of the MMPA. While the statute contemplates regulation of the commercial fishing industry, NMMA can find no suggestion that NMFS is empowered to regulate vessel speeds over most of the eastern seaboard throughout much of the boating season. Such a rule would invite challenge under the major questions doctrine. Moreover, basing the rule on the MMPA's "necessary and appropriate" language would invite a challenge based on the non-delegation doctrine because such a rule would be based on an impermissible delegation of legislative power to an executive branch agency with no meaningful intelligible principle to guide the agency's action.

Second, because NMFS has not properly examined the Proposal's impacts, it has not ascertained how the Proposal will limit people's public access or ability to use their boats. NMFS must realize that this rule is not just a speed limit that will slow down boats; it is a severe restriction on the ability to use boats shorter than 65 feet. The Proposal will preclude boats from traveling far enough off shore to travel at the speeds for which they are designed to operate safely, will make such passages impossibly long, and will increase the risks of loss of life to boat owners. As such, the Proposal is not only arbitrary and capricious, but raises significant Fifth Amendment regulatory takings issues that NMFS must address.

Finally, NMFS's vague discussions about increased surveillance technology to track speed and enforce the Proposal raises issues under the Fourth Amendment's right to be free from unreasonable searches and seizures. Tracking speed data would likely fall into the

Supreme Court’s recent jurisprudence on cell phone location data and GPS tracking data. This raises issues for the Proposal at the promulgation and enforcement stages.

DISCUSSION

I. NMFS has not engaged in rational decision making in promulgating the Proposal.

NMFS has issued the Proposal pursuant to its authority under section 112(a) of the Marine Mammal Protection Act (“MMPA”)⁷ and section 11(f) of the Endangered Species Act (“ESA”).⁸ The MMPA authorizes NMFS, in consultation with affected agencies, to promulgate “necessary and appropriate” regulations, and the ESA authorizes the promulgation of “appropriate” regulations. In the absence of explicit delegation of power to an agency, a regulation is necessary and appropriate if, among other things, it “rationally complements” the statutory scheme.⁹ A regulation not based on rational decision making is not necessary and appropriate, and is consequently arbitrary, capricious, and otherwise unlawful under the Administrative Procedure Act (“APA”).¹⁰ The Proposal is not the product of rational decision making because NMFS (1) relies on flawed and incomplete data that do not represent *actual* risk (as opposed to modeled risk) of right whale vessel strikes and (2) draws conclusions unsupported by the evidence before the Agency. NMFS must address and resolve these issues before implementing any potential regulatory changes.

A. NMFS relies on incomplete data and thus overstates the risk of whale strikes by smaller vessels.

The data NMFS uses to justify the Proposal’s provisions is flawed in several important ways. First, NMFS relies on a model that simulates the likelihood of a fatal vessel strike in space and time using various sources of right whale and vessel traffic data.¹¹ But the model used relies on biased right whale spatial density data to estimate the risk of right whale vessel strikes. The model predicts seasonal density of right whales along the East Coast based on observed distribution of right whales between 2010 and 2018.¹² NMFS acknowledges that

⁷ 16 U.S.C. § 1382(a).

⁸ *Id.* § 1540(f).

⁹ *Balelo v. Baldrige*, 724 F.2d 753, 760 (9th Cir. 1984) (construing the “necessary and appropriate” language in section 103 of the MMPA).

¹⁰ 5 U.S.C. § 706 (“The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [and] in excess of statutory jurisdiction, authority, or limitations”); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))).

¹¹ See 87 Fed. Reg. at 46,925-26.

¹² Lance P. Garrison et al., NOAA Technical Memorandum NMFS-SEFSC-757T, Assessing the risk of vessel strike mortality in North Atlantic right whales along the U.S East Coast, at 11-12 (May 2022),

data concerning right whale density in the Mid-Atlantic may be “unrealistic” because more recently observed higher localized right whale densities in the Nantucket Shoals “strongly influences the Mid-Atlantic regional model and may result in positively biased density estimates.”¹³ However, the Agency does not appear to resolve this error. The result is a risk analysis that overstates the risk of right whale strikes from 35-to-65-foot vessels. Consequently, the Agency’s measures for addressing this issue are therefore overly expansive.

Second, the data NMFS relies on does not specifically identify the depth of right whales in relation to the draft depth of vessels of various sizes. The risk model “used a depth of 10 m to indicate that a whale was within the draft depth of the majority of vessels and would therefore be at risk of an interaction.”¹⁴ This assumption is problematic when it comes to vessels within the 35-to-65-foot range, as these vessels typically have a maximum draft of less than two meters. This information is readily available to the Agency through coordination with the proper stakeholders. For example, NMMA was able to quickly verify with Viking Yachts that its 64-foot vessel, which is a very large and heavy vessel, has a maximum draft of 2.16 meters. A 37-foot vessel that Viking produces has a draft of only 1.34 meters. Yet, NMFS’s model does not account for the draft depth of 35-to-65-foot vessels when assessing the risk of a strike from vessels of this size. The result is, again, an overstatement of strike risk to right whales from smaller vessels.

Finally, NMFS relies on flawed assumptions of vessel traffic patterns. The model uses Automatic Identification Systems (“AIS”) data collected between 2017 and 2019.¹⁵ Our understanding is that NMFS tracking, which is based on AIS data, accounts for only approximately 30% of smaller vessel traffic. Thus, approximately 70% of smaller vessel traffic is unaccounted for. But, defying common sense, the Agency fails to distinguish between the traffic pattern of large and small vessels. Thus, the vessel traffic information on which the Agency bases its proposals is biased toward the traffic patterns of larger vessels. This defies common sense. The AIS data for smaller vessels represents the most common routes for that traffic, given their common nearshore uses. It would be unusual to find substantial vessel traffic outside of the areas identified through existing AIS data for smaller vessels. Again, the result is an overstatement of strike risk to right whales from smaller vessels.

https://media.fisheries.noaa.gov/2022-07/Right_Whale_Vessel_Strike_Risk_Assessment_NMFS-SEFSC-757_508.pdf [hereinafter NOAA Technical Memorandum].

¹³ *Id.* at 12.

¹⁴ *Id.* at 8. NOAA vessel strike models use static values, not running draft. Use of a static value does not accurately capture the proper draft of a running vessel, and, as such, NOAA’s risk model calculations are flawed.

¹⁵ NOAA Technical Memorandum, at 10.

Combined, these errors result in an overestimation of potential risk to right whales from vessels that are 35 to 65 feet in length. This overestimation is stark when considering the actual historical data on right whale strikes from vessels of this size.¹⁶ According to NMFS, vessels smaller than 65 feet accounted for five of the twelve documented lethal strike events in U.S. waters since 2008.¹⁷ Using Marine Recreational Information Program (“MRIP”) data published by NOAA, we know that, since 2008, at least 5.1 million offshore fishing trips were taken by vessels 35-65 feet in length (out of 92 million total fishing trips taken during this time).¹⁸ Assuming all 5 right whale strikes were from recreational vessels less than 65 feet in length and that all these vessels were on fishing trips, the chance of a 35-to-65-foot recreational vessel striking a right whale during an offshore fishing trip is at most 0.000098%, or less than 1 in 1,000,000.¹⁹ Of course, this assumption itself overstates the risk, as the MRIP program does not capture all recreational vessel activity. In reality, there are thousands of additional nearshore and offshore trips made by both recreational and commercial vessels 35-65 feet in length each year that have nothing to do with fishing.²⁰

As a result of these data flaws and the overestimated risk of vessel strikes from smaller vessels, NMFS has proposed changes that drastically expand vessel speed restrictions on the regulated community but will not likely have a meaningful impact on the right whale mortality events the Agency seeks to address. NMFS cannot and should not proceed with the proposed changes based on the incomplete and flawed data and analyses highlighted above. Instead, we urge NMFS to consult with stakeholders impacted by the rule, such as the recreational boating and fishing industries, and conduct additional analysis using industry and other unpublished data to address violated assumptions of the current risk modeling and the associated expansion of the speed zones. This information is readily available to NMFS, directly relevant to the rule at issue, and can help the Agency promulgate rational, effective measures to address continued right whale mortality events from vessel strikes.

B. NMFS draws conclusions unsupported by the data before the Agency.

Not only does NMFS rely on erroneous and incomplete data, as described above, it draws unsupported conclusions from that data regarding the proposed measures for reducing right whale vessel strikes. As explained above, agency decision making must be based on “a

¹⁶ See generally Southwick Associates, Impact Analysis for Proposed Modification to the North Atlantic Right Whale Vessel Speed Rule (Sept. 2022) [hereinafter *Southwick Report*].

¹⁷ 87 Fed. Reg. at 46,924.

¹⁸ *Southwick Report*, at 2.

¹⁹ *Id.*

²⁰ *Id.*

rational connection between the facts found and the choice made.”²¹ An agency acts arbitrarily and capriciously if it “offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²² NMFS has failed to draw rational conclusions in at least two distinct ways and therefore cannot move forward with the Proposal.

First, NMFS’s analysis does not support a proposed expansion of the existing SMAs. NMFS states that expanded SMAs (now referred to as Seasonal Speed Zones or SSZs) are necessary because strikes have occurred both inside and outside the current SMAs.²³ Based on the risk model, NMFS mapped the monthly spatial distribution of strike risk and set new SSZ boundaries by identifying areas where mandatory speed reduction would have the greatest impact on reducing overall strike mortality risk.²⁴ However, NMFS notes that since 2008, 4 out of 5 whale strikes involving vessels less than 65 feet occurred *inside active* SMAs.²⁵ Thus, it is unclear how a vast geographic expansion of the existing SMAs from Massachusetts to north Florida is rationally connected to the facts before the Agency. At the very least, this suggests that NMFS has absolutely no basis for expanding the SMAs.

Second, NMFS’s proposal to extend speed restrictions to vessels as small as 35 feet also is unsupported by even the incomplete and erroneous data. While boats as small as 17 feet have been involved in right whale strikes since 2005, the data make clear that only vessels 42-54 feet were involved in strikes resulting in serious injury or mortality.²⁶ Indeed, NMFS has identified only 6 strikes by boats of 42-54 feet resulting in serious injury or mortality during that time.²⁷

To justify its amended rule, NMFS also relies on the Canadian government’s 2017 decision to impose a dynamic mandatory 10-knot speed restrictions in the Gulf of St. Lawrence on vessels 42.7 feet or more in length.²⁸ Yet this reliance is completely misplaced. First, there continue to be significant numbers of fatal right whale strikes in this area, suggesting that the speed reduction imposed there is not working.²⁹ Moreover, even if the Canadian rules had a positive effect, they do not justify imposing a rule that applies to vessels

²¹ *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

²² *Id.*

²³ 87 Fed. Reg. at 46,924.

²⁴ *Id.* at 46,926.

²⁵ *See id.* at 46,924.

²⁶ *Id.* at 46,928.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See, e.g.*, North Atlantic Right Whales are on the Brink of Extinction, Oceana, <https://oceana.ca/en/our-campaigns/protect-north-atlantic-right-whales/> (last accessed Oct. 31, 2022) (indicating that despite the vessel speed rule in Canada, 21 right whales were killed in Canadian waters between 2017 and 2022).

as small as 35 feet. NMFS offers no explanation for why this number was chosen, particularly since vessels smaller than 42 feet have not been involved in a single strike resulting in serious injury or mortality in at least 17 years.³⁰ This is not to suggest that NMMA favors a rule that applies to boats of 42 feet in length or greater; NMMA objects to the proposed speed restrictions on any vessel less than 65 feet in length as unsupported by sufficient evidence. NMMA merely points out that using a Canadian rule that applies to 42-foot boats cannot possibly support a rule that applies to 35-foot boats.

Because of these unsupported conclusions, NMFS has proposed measures that will cause unnecessary and considerable harm to owners and operators of small recreational and fishing vessels without first understanding whether these vessels are even the cause of right whale injury and mortality. Without that understanding, the rule appears to do little to address right whale vessel strike mortality. Accordingly, NMFS must reexamine the information before the Agency, engage stakeholders as necessary to fill in the gaps, and reassess its conclusions to ensure it has engaged in the type of rational, evidence-based rulemaking that the APA requires—and that will actually help preserve the right whale population.

II. The EA conducted by NMFS does not meet the Agency’s NEPA obligations.

The National Environmental Policy Act (“NEPA”) requires that federal agencies “take a ‘hard look’ at environmental consequences” of major federal actions.³¹ NEPA requires preparation of an environmental impact statement (“EIS”) for major federal actions significantly affecting the quality of the human environment.³² An EIS must examine “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”³³ For actions that will not significantly affect the environment or for which the significance of the effects is unknown, an agency may prepare a more concise Environmental Assessment (“EA”).³⁴

NMFS failed to comply with NEPA by not preparing an EIS (and instead preparing an EA) despite the significant devastating recreation and economic impacts the Proposal will

³⁰ To be clear, based on the data and modeling errors identified in Section I.a, we do not believe that any restrictions on vessels 35 to 65 feet are warranted.

³¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

³² 42 U.S.C. § 4332(C).

³³ *Id.*

³⁴ 40 C.F.R. § 1501.5(a).

have on small vessels. Even if an EIS were not required, however, the EA prepared by NMFS does not adequately discuss alternatives to the Proposal. We urge NMFS to conduct a full EIS to take the requisite “hard look” at the Proposal’s environmental impacts, or at a minimum, consider other reasonable alternatives to the Proposal in the EA.

A. NMFS should prepare an EIS because the Agency grossly underestimates the proposal’s recreation and economic impacts.

NMFS concluded that the Proposal would not significantly adversely affect the quality of the human environment and that an EIS was therefore not required.³⁵ But in concluding this, the EA downplays the impact on smaller vessels: “NMFS recognizes that this regulatory option imposes a moderate burden on the regulatory community that will be disproportionately borne by those vessels that frequently transit at high speeds (in excess of 10 knots) in areas and at times that overlap with proposed SSZs or DSZs.”³⁶ NMFS estimates the total cost of the proposal to recreational vehicles at almost \$1.2 million (and on smaller recreational vessels specifically at approximately \$869,000) based solely on the transit delays that speed restrictions would cause.³⁷

NMFS’s conclusion severely underestimates the cost to small vessels. NMFS identifies 9,200 recreational vessels that will be affected by the proposed rule.³⁸ In reality, however, there are in fact closer to 63,000 registered recreational saltwater vessels measuring 35-65 feet in states bordering the proposed SSZs. Furthermore, more than 70,000 recreational fishing trips in the 35-to-65-foot size class take place each year in the Atlantic Ocean more than 3 miles offshore in states with proposed SSZs during the months when the speed restrictions would be in place.³⁹ Based on this data, the cost to recreational anglers traveling more than 3 miles offshore would be \$15 million, more than a factor of 10 greater than the cost estimated by NMFS.⁴⁰

NMFS’s conclusion also ignores other direct and indirect costs to recreational boating and related industries. Most obviously, it is entirely foreseeable that a portion of trips by vessels 35-65 feet in length will likely be entirely foregone because of the impracticability of conducting extensive transit at 10 knots. This is because boats in the 35-to-65-foot size are frequently used in close proximity to the shore and at speeds greater than 10 knots—which

³⁵ Draft Environmental Assessment for Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, at 36 (July 2022) [hereinafter *Draft EA*].

³⁶ *Id.* at 55.

³⁷ Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis, Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, at 34 (July 2022) [hereinafter *Draft RIR*].

³⁸ *Draft EA*, at 35; *Draft RIR*, at 31.

³⁹ As many as 52,000 additional inshore vessel trips may be impacted by the SSZs.

⁴⁰ *Southwick Report*, at 2.

is what they are designed for. The alternative, sailing at 10 knots beyond the proposed SSZs before operating at ideal speeds, would take far too much time. Moreover, many boaters are not comfortable going so far out to sea, and many boats in this size class are simply not designed for operations that far out. This will also increase risk to boaters who travel further from shore. Accordingly, boaters will not use their boats as often or will stop using them altogether.

This would not only affect the boaters themselves (for example, by harming fishing, charter, and party boat operations) but would also devastate operations like marinas and tackle shops that would see activity decrease as small vessel users reduce or altogether forego trips. Moreover, it is likely that consumer purchases of vessels 35-65 feet in length will decline substantially because the burdens these speed restrictions will place on small vessels will make them unattractive to current or new boaters. Reduced demand for vessels of this size would devastate recreational boat manufacturers, resulting in lost profits, job layoffs, and other socioeconomic impacts that far exceed the value of NMFS's cost estimate. Notably, even NOAA Office of Law Enforcement ("OLE"), in its 3rd Quarter, FY 2022 Council Report, conceded that "the amended speed rule . . . [will] significantly impact" pleasure crafts.⁴¹ A related effect will be felt by charitable organizations. Frequently, charitable organizations use fishing tournaments to raise revenue in support of their communities and those in need.⁴² Time, safety, and location risks will reduce the viability of such events.

NMFS's decision not to prepare an EIS ignores the true impact of the Proposal. Considering the Agency prepared an EIS for the 2008 rule establishing the current restrictions,⁴³ it is troubling that the Agency has decided that the proposed amendments to the 2008 rule—which will have more wide-reaching and severe impacts—do not warrant in-depth NEPA review. NMFS must therefore consider the additional economic data described above and prepare an EIS fully evaluating the proposal's impacts.

⁴¹ Council Report – 3rd Quarter, FY 2022, NOAA Office of Law Enforcement, at 5 [hereinafter *NOAA OLE Council Report*].

⁴² See, e.g., Make A Difference Fishing Tournament, Inc., a 501(c)(3) nonprofit organization dedicated to helping children with disabilities through fishing tournaments in Florida and Georgia, <http://www.makeadifferencefishing.com/>; Fishing Funds the Cure holds fishing tournament events that raise funds for the National Pediatric Cancer Foundation, <https://nationalpcf.org/programs/fishing-funds-the-cure/>.

⁴³ Available at <https://repository.library.noaa.gov/view/noaa/16385>.

B. NMFS failed to adequately consider alternatives to the proposed action.

Even if NMFS were not required to prepare an EIS, the Agency still must revisit the EA. An EA shall “[b]riefly discuss . . . alternatives as required by section 102(2)(E) of NEPA.”⁴⁴ There is no minimum number of alternatives that an agency must consider, so long as the agency considers all reasonable alternatives.⁴⁵ Here, the Agency failed to consider reasonable alternatives that would achieve a similar goal (fewer right whale strikes) with fewer recreation and economic impacts. The EA must therefore be updated.

For example, it was improper for NMFS to fail to consider in detail the alternative that would have restricted speed for boats greater than or equal to 50 feet in length.⁴⁶ NMFS justifies not considering this alternative because “[e]vidence from confirmed collision events, reported by vessel operators, demonstrate that vessels smaller than 50 ft in length have caused right whale mortalities and serious injuries within U.S. waters,” and that the alternative would therefore not meet the Proposal’s purpose and need.⁴⁷ As discussed above, however, the Agency’s reliance on flawed data, analysis, and unsupported conclusions undermines NMFS’s reasoning for eliminating this alternative from detailed consideration. Again, NMMA rejects the premise that the Proposal should be applied to any vessel smaller than 65 feet in length, but failing to consider of a 50-foot rule calls into question NMFS’s entire rulemaking process and suggests the Proposal is arbitrary and capricious.

It is also unclear why NMFS did not consider other reasonable alternatives with greater rational connection to the problem identified by the Agency. For sake of argument, NMFS could have considered a less burdensome alternative involving restrictions like those in Canada (*i.e.*, speed restrictions that apply to vessels greater than 42 feet), especially since the data do not support applying restrictions to vessels smaller than 42 feet. NMFS’s failure to even consider this reasonable alternative is another example of how this Proposal does not satisfy the requirements under NEPA.

Further, NMFS should have considered an alternative involving better enforcement by the Coast Guard of current restrictions. As discussed in more detail below, NMFS itself has acknowledged that enforcement of the current speed restrictions is poor; data indicate that “a significant amount of [large] vessel traffic . . . continues to transit active [restricted zones] at speeds in excess of 10 knots,” and that large vessels approaching and departing Mid-Atlantic and Southeast ports traveling at excessive speed pose a particular risk to

⁴⁴ 40 C.F.R. § 1501.5(c)(2).

⁴⁵ See *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005).

⁴⁶ *Draft EA*, at 23.

⁴⁷ *Id.*

migrating right whales and mother-calf pairs on nursery grounds.⁴⁸ This suggests that a reasonable alternative to expanding the scope of the speed restrictions would be increasing enforcement of the current speed restrictions and ensuring compliance by large vessels in areas where right whales may be particularly vulnerable (such as along migration routes or in nursery grounds in the Mid-Atlantic and Southeast).

NMFS also failed to consider other technology-based alternatives. For example, the Agency should have considered use of surveillance technology to track actual right whale locations and the using targeted USCG measures (e.g., Notice to Mariners) to alert boaters of right whales. Many other alternatives, such as technologies used by the U.S. Navy, likely exist and should be explored before adopting a rule with such far-reaching effects on the public and such little evidence of addressing the depletion of the right whale population.

In sum, NMFS must update its analysis to consider these reasonable alternatives and ensure the Agency has engaged in the type of informed decision-making that NEPA requires.

III. NMFS was required to consult with the USCG before issuing the proposal.

The MMPA provides that the “Secretary, *in consultation with any other Federal agency to the extent that such agency may be affected*, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of [the MMPA]” (emphasis added).⁴⁹ The USCG is one of several agencies affected by the proposed changes to the Vessel Speed Rule, but there is no indication that the USCG was consulted prior to issuance of the Proposal.⁵⁰ This consultation must occur before NMFS finalizes any changes to the Rule.

A. USCG is Charged with Enforcing the MMPA.

The USCG has broad legal authority over navigation safety in the navigable waters of the United States.⁵¹ For example, the USCG may board any vessel subject to the jurisdiction of the United States to make inquiries, examinations, inspections, searches, seizures, and arrests for the prevention, detection, and suppression of violations of federal

⁴⁸ *North Atlantic Right Whale Vessel Speed Rule Assessment*, Office of Protected Resources, NOAA Fisheries, at 24-25 (June 2020), https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf?null [hereinafter referred to as *NOAA Speed Rule Assessment*].

⁴⁹ 16 U.S.C. § 1382(a).

⁵⁰ In addition to the USCG, law enforcement officers and agents from U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, U.S. Fish and Wildlife Service, and other State or territorial officers monitor compliance and investigate potential violations of the statutes and regulations enforced by NOAA, such as the MMPA. *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions*, NOAA Office of General Counsel – Enforcement Section, § II.B, (June 24, 2019), <https://www.gc.noaa.gov/documents/Penalty-Policy-FINAL-June242019.pdf>.

⁵¹ *Authorities*, USCG, Dep’t of Homeland Security (June 12, 2018), <https://www.uscg.mil/readings/Article/1548177/authorities/>.

laws.⁵² The USCG may use its personnel and facilities to assist federal, state, and local agencies when USCG assets are especially qualified to perform a particular activity.⁵³ The USCG also safeguards fisheries and marine protected resources by enforcing living natural resource authorities such as the ESA⁵⁴ and the MMPA.⁵⁵

USCG works closely with NOAA and NMFS to assist with mariner compliance of federal regulations and to support enforcement efforts of the OLE and NOAA Office of General Counsel (“NOAA GC”).⁵⁶ NOAA has offered data indicating that together, NOAA GC, OLE, and USCG undertake approximately 60 enforcement related contacts each year.⁵⁷ As such, the USCG has played a key role in enforcing the Vessel Speed Rule.⁵⁸ Specifically, USGC enforcement of the Vessel Speed Rule includes certain hail and inform efforts: When on navigable waters, USCG hails applicable vessel operators who they detect moving in excess of 10 knots in active SMAs, reminds them of the Vessel Speed Rule, and informs them they should reduce their speed accordingly. Vessel compliance with hail instructions is noted and reported by the USCG to NMFS.⁵⁹

Enforcement of the Speed Rule is also carried out by all available technologies, including remote monitoring of radio signals sent by vessels and AIS data,⁶⁰ which determines whether a vessel has exceeded the speed limit in the regulated zones.⁶¹ AIS is a

⁵² 14 U.S.C. § 89.

⁵³ *Id.* § 141(a).

⁵⁴ 16 U.S.C. § 1540(e).

⁵⁵ *Id.* § 1543. Congress has reinforced the U.S. Coast Guard’s authority to consider the effects of vessel routing measures on right whales in the Coast Guard and Maritime Transportation Act of 2004, Pub. L. No. 108-293, 118 Stat. 1028, which directs the Coast Guard and NOAA to cooperate in analyzing potential vessel routing measures for reducing strikes of North Atlantic right whales. 118 Stat. 1065-66.

⁵⁶ *NOAA Speed Rule Assessment*, at 30. The 2008 Speed Rule is enforced in various ways: OLE sends out compliance assistance letters to mariners found to have exceeded the 10-knot speed limit; NOAA issues Notices of Violation and Assessment of Administrative Penalty and Written Warnings to vessels found to have exceeded the 10-knot speed limit in SMAs subject to the rule; USCG enforces the rule upon navigable waters.

⁵⁷ *Id.* at 31. Data collected between 2017 and 2019 indicate that NOAA GC, OLE, and USCG had a total of 178 enforcement related contacts: There were 60 contacts in 2017, 54 in 2018, and 64 in 2019.

⁵⁸ 50 C.F.R. § 224.105.

⁵⁹ *NOAA Speed Rule Assessment*, at 30-31.

⁶⁰ Local, state and federal agencies are permitted to request real-time or historical USCG AIS data. *AIS Frequently Asked Questions*, Navigation Center, USCG, <https://www.navcen.uscg.gov/ais-frequently-asked-questions#17> (last accessed Oct. 29, 2022); *see also NOAA OLE Council Report*, at 5 (describing a three-day multi-agency speed enforcement operation in which vessels were checked via radar and AIS).

⁶¹ *NOAA Speed Rule Assessment*, at 8; *see also NOAA study shows educating, warning, and citing speeding mariners helps lower ship speeds in areas with endangered North Atlantic Right Whales*, NOAA (June 3, 2014), <https://www.noaa.gov/noaa-study-shows-educating-warning-and-citing-speeding-mariners-helps-lower-ship-speeds-areas> (highlighting a study of compliance with speed regulations between 2008 and 2013 in which “[t]he owners or operators of 437 . . . ships received non-punitive notifications of violations and were reminded of the

piece of marine electronics equipment made mandatory for certain vessels, generally over 65 feet, and is intended to improve navigational safety.⁶² Owners of small vessels are not required to – but may – install AIS,⁶³ and the percent of small vessels that utilize AIS is unknown.⁶⁴ In its Proposal, NMFS notes it has “commenced staff level discussions with the USCG regarding possible modification of current AIS carriage requirements to include additional vessel types and sizes” and acknowledges that at-sea enforcement operations will expand.⁶⁵ But these initial conversations do nothing to address the obvious reality that enforcement of the proposed changes will fall squarely upon the USCG to increase the hail and inform activities to enforce the speed restrictions on small vessels.

Expanded USCG enforcement obligations may lead to the unintended consequence of diverting USCG resources away from other programs. The USCG manages six major operational mission programs and oversees eleven Missions, as codified in the Homeland Security Act of 2002.⁶⁶ Critical Homeland Security Missions authorize the USCG to oversee ports, waterways, and coastal security; drug interdiction; migrant interdiction; defense readiness, and other law enforcement activities. Other USCG Missions pertain to search and rescue; aids to navigation; living marine resources; marine environmental protection; ice operations; and marine safety.⁶⁷ For example, in a single year, the USCG responds to nearly 20,000 Search and Rescue cases, saves nearly 4,000 lives and recovers almost \$80 million in property; it conducts over 25,000 container inspections; it interdicts nearly 3,000 undocumented migrants; it removes over 100 metric tons of cocaine bound for the United States; and it screens over 435,000 vessels, among many other activities.⁶⁸ By issuing the Proposal without consulting the USCG, NMFS is unilaterally expanding USCG enforcement obligations with no confirmation that USCG can, in fact, adequately enforce the Rule without hampering its other missions.

regulation, or cited after they were observed violating the restrictions [and] 26 of them received citations and were fined”).

⁶² 33 C.F.R. § 164.46(b).

⁶³ *Id.*

⁶⁴ NOAA provides no clear data on the number of small vessels that voluntarily carry AIS. Its Speed Rule Assessment assumes that more small vessels will use AIS as the cost decreases. *NOAA Speed Rule Assessment*, at 8.

⁶⁵ 87 Fed. Reg. at 46,932.

⁶⁶ *Missions*, USCG, Dep’t of Homeland Security (June 12, 2018), <https://www.uscg.mil/readings/Article/1548611/missions/>.

⁶⁷ *Id.*

⁶⁸ *U.S. Coast Guard Facts*, U.S. Coast Guard's Boating Safety Division, <https://uscgboating.org/content/us-coast-guard-facts.php> (last accessed Oct. 29, 2022).

NMFS states that in the Proposal it “aimed to identify the smallest spatial and temporal footprint possible for speed restricted areas to minimize the extent of regulatory action while achieving necessary conservation goals.”⁶⁹ However, by expanding the mandatory speed restrictions of 10 knots or less in designated areas of the ocean to include most vessels 35-65 feet in length and broadening the spatial boundaries and timing of the seasonal speed restriction areas, NMFS has significantly increased the regulatory and enforcement burden upon affected agencies, especially the USCG and its counterparts in state marine enforcement programs.⁷⁰ Indeed, the Proposal expands the territory of the MMPA to areas in the Mid-Atlantic “in relatively shallow waters over the continental shelf,” and especially in “[h]igh-density vessel traffic areas in approaches to major commercial ports”⁷¹ – areas where the USCG is currently engaged in critical homeland security missions and operations. The Proposal unquestionably will affect the USCG; thus, NMFS consultation with USCG was required.

B. Rather than Expanding the Scope of the 2008 Speed Rule, NMFS Should Focus on Improving Compliance of and Enforcement over Large Vessels.

The greatest threat to mortality of the North Atlantic Right Whale is collision with large vessels and entanglement in fishing gear.⁷² The Vessel Speed Rule was first promulgated in 2008 to reduce the likelihood of deaths and serious injuries to endangered North Atlantic Right Whales that result from collisions with ships and other large vessels.⁷³ The rule was explicit, stating “the primary cause of the species’ failure to recover is believed to be mortality caused by collisions with ships and entanglement in commercial fishing gear.”⁷⁴

⁶⁹ 87 Fed. Reg. at 46,925.

⁷⁰ NOAA OLE Council Report, at 5.

⁷¹ 87 Fed. Reg. at 46,926.

⁷² Entanglement in fishing gear and vessel strikes are the leading causes of North Atlantic right whale mortality. Since right whales live and migrate along routes “close to major ports along the Atlantic coastline and often overlap with shipping lanes...right whales [are] vulnerable to collisions with vessels.” *North Atlantic Right Whale*, NOAA Fisheries, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#:~:text=Entanglements,-Image&text=Entanglement%20in%20fishing%20gear%20is,fishing%20gear%20at%20least%20once> (last accessed Oct. 29, 2022). Similarly, the World Wildlife Federation notes that “[t]oday, the [Right Whale] is threatened by ship collisions, entanglement in fishing nets, and separation from calving areas because of shipping traffic.” *North Atlantic Right Whale Facts*, World Wildlife Federation, <https://www.worldwildlife.org/species/north-atlantic-right-whale> (last accessed Oct. 29, 2022).

⁷³ Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 73 Fed. Reg. 60,173 (Oct. 10, 2008); NOAA *Speed Rule Assessment*, at v.

⁷⁴ “Based on massive injuries found on whales killed by ships (e.g., crushed skulls, severed tail stocks, and deep, broad propeller wounds), it appears that a large majority of right whales killed by vessels are victims of collisions with large ships.” 73 Fed. Reg. at 60,174.

In June 2020, NOAA Fisheries, Office of Protected Resources, issued a report to determine the effectiveness of the Vessel Speed Rule and the extent to which it had reduced the incidence of right whale mortality and serious injury due to vessel strikes.⁷⁵ The report acknowledges that compliance with the Vessel Speed Rule varies by region, has fluctuated over the years, and needs improvement.⁷⁶ For example, data indicate that “a significant amount of [large] vessel traffic...continues to transit active [restricted zones] at speeds in excess of 10 knots.”⁷⁷ The report notes that excessive speeds of large vessels approaching and departing ports in the Mid-Atlantic and Southeast Regions are of great concern because of the presence of migrating right whales and mother-calf pairs on the nursery grounds.⁷⁸ Container ships have demonstrated the lowest level of compliance at seventy-six percent.⁷⁹

Nor is enforcement of the Vessel Speed Rule standard across regions and ports: In some, mariners are subjected to observation and enforcement but not in others, even where the speed limits are the same. Large vessel compliance varied dramatically between the 11 port entrance areas.⁸⁰

NMFS consultation with the USCG prior to issuing the Proposal would have, at minimum, addressed gaps in compliance and enforcement of the existing Vessel Speed Rule, which applies to vessels that pose the greatest potential risk to the North Atlantic Right Whale. Limited USCG resources might be better put toward enforcing the existing rule instead of extending USCG speed regulation oversight upon tens of thousands of additional recreational boat operators. If compliance with and enforcement of the existing Vessel Speed Rule is not first addressed, one wonders how NMFS determined that the USCG could properly enforce the proposed changes to the Vessel Speed Rule.

C. The USCG is charged with issuing regulations regarding the safe design and operation of vessels.

Regulations affecting the operation of vessels must be coordinated with the USCG to ensure safety. Thus, NMFS was required to consult with USCG prior to proposing expanded mandatory speed restrictions of 10 knots or less in designated areas to include small vessels.⁸¹ Indeed, the USCG is responsible for developing and promulgating national regulations and

⁷⁵ Executive Summary, *NOAA Speed Rule Assessment*.

⁷⁶ *Id.* at 10-11.

⁷⁷ *Id.* at 12.

⁷⁸ For example, in the 2018-2019 season, “[a] very high proportion of vessel traffic exceeding 12 knots (20.73%) was noted in the North Carolina to Georgia SMA.” *Id.* at 12.

⁷⁹ *Id.* at 11.

⁸⁰ *Id.* at 13.

⁸¹ *Id.* at v.

standards that govern the safe design and construction of vessels.⁸² The Recreational Boating Product Assurance Branch is part of the USCG's Boating Safety Division and is responsible for developing and enforcing Federal safety standards for smaller vessels.⁸³ As currently proposed, however, a 35-foot recreational fishing boat would be subject to the same speed restrictions as a general cargo vessel or bulk carrier, despite significant design differences based on size.

And yet, even NOAA acknowledges, from a safety standpoint, operators and passengers in smaller vessels are more vulnerable to whale strikes than their much larger counterparts. When smaller vessels collide with whales, it is also the vessel and onboard passengers that are in danger, such that “[f]or small and mid-sized vessels, whale awareness is a matter of safety for both mariners and whales.”⁸⁴ Considering USCG's mission and expertise, NMFS should have consulted with the USCG as to whether mandating a slow speed for smaller boats in certain zones is consistent with safe boat operation.

USCG regulations provide that the safest speed at which a vessel should be operated is dependent on a broad range of environmental conditions, stating that “[e]very vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance *appropriate to the prevailing circumstances and conditions*” (emphasis added).⁸⁵ Factors to consider when determining a “safe speed” include “the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions,” and “[t]he state of wind, sea, and current, and the proximity of navigational hazards.”⁸⁶ The question of maneuverability is relevant in distinguishing between large and small vessels. While large ocean-going vessels “cannot reasonably be expected to sight whales nor take evasive action to avoid striking whales due to the vessels’ enormous size and *restricted maneuverability*” (emphasis added), NOAA concedes that “[s]ome mid-sized and small vessels possess the maneuverability to take evasive action if whales are sighted and are more likely to perceive a whale strike.”⁸⁷

⁸² See, e.g., 33 C.F.R. §§ 173-199 (“Boating Safety”), 181 (“Manufacturer Requirements”), and 183 (“Boats and Associated Equipment”). The USCG has a division specifically dedicated to small vessels, including recreational boats. See, e.g., *A Boater’s Guide to the Federal Requirements for Recreational Boats and Safety Tips*, Boating Safety Division, USCG, <https://www.uscgboating.org/images/420.PDF> (last accessed Oct. 29, 2022).

⁸³ *Product Assurance Branch*, U.S. Coast Guard Boating Safety Division, <https://www.uscgboating.org/content/product-assurance-branch.php> (last accessed Oct. 29, 2022).

⁸⁴ *NOAA Speed Rule Assessment*, at 2-3.

⁸⁵ 33 C.F.R. § 83.06.

⁸⁶ *Id.*

⁸⁷ *NOAA Speed Rule Assessment*, at 2.

USCG regulations on safe boating speed is affirmed by vessel manufacturing experts who recognize that vessel speed is a significant safety feature on a small vessel. A 10-knot speed limit restriction could deprive small boat operators of significant visibility and stabilizing mechanisms and force them to travel in conditions that would compromise safety of the passengers and vessel. Unlike ocean going and large commercial vessels, most recreational boats lack the high displacement hull design that provides their larger counterparts with stability and the ability to operate safely in varied sea states. Small, recreational vessels, by contrast, are often designed to utilize speed as a way of maintaining stability and safe operation of their craft. For example, speed affects vessel draft, which is the vertical distance between the waterline and the bottom of a vessel hull. When idled or unnecessarily slowed, a vessel's draft increases, and a vessel becomes less stable. Planing is another speed-dependent safety feature that occurs when a vessel reaches its intended speed and achieves a hydrodynamic lift, such that the vessel safely travels upon the water. Planing not only increases stability, but in some vessel designs, it allows a boat operator to see more clearly over the bow. Operating at lower speeds in these vessels raises the bow, which reduces the visibility of the operator to see and avoid hazards in the water, including right whales. In fact, the Proposal may actually have the unfortunate consequence of reducing operator visibility and *elevating* the risk of collisions with whales.

Speed is also a safety asset when localized weather events, such as thunderstorms, require a boat operator to return to port at an operational speed above 10 knots. The proposed Rule provides certain exceptions to the speed restriction, but the exceptions still do not properly consider safe boating operation. As drafted, the Proposal allows a vessel to operate at a speed in excess of 10 knots:

“ . . . in an active designated SSZ or DSZ only if: (1) Justified because an emergency situation presents a threat to the health, safety, or life of a person; (2) Necessary to maintain safe maneuvering speed and justified because the vessel is in an area where oceanographic, hydrographic, and/or meteorological conditions severely restrict the maneuverability of the vessel and the need to operate at such speed is confirmed by the pilot on board or, when a vessel is not carrying a pilot, the master of the vessel; or (3) A vessel less than 65 ft (19.8 m) in length is transiting within areas where a National Weather Service Gale Warning, or other National Weather Service Warning (e.g., Storm Warning, Hurricane Warning) for wind speeds exceeding those that trigger a Gale Warning is in effect.⁸⁸

⁸⁸ 87 Fed. Reg. at 46,930.

Gale warnings are issued by the National Weather Service when wind speeds are in the range of 39 mph to 54 mph.⁸⁹ Yet boating experts attest to the fact that vessels between 35 and 65 feet cannot operate safely at 10 knots during wind speeds that exceed a much lower threshold of approximately 25 mph.⁹⁰ This discrepancy in safe boat operation is just one example of the need for NMFS to consult with USCG when issuing regulations governing restrictions on vessel speeds.

IV. The Economic Impact Analysis is Deficient and Understates Economic Impacts.

The Proposal has been determined to be “significant” under Executive Order 12866 (“EO 12866”).⁹¹ A “significant regulatory action” is one that is likely to “[h]ave an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, jobs” or State and local governments and communities.⁹² NOAA acknowledges the Proposal will have a “significant” impact on recreational fishing, an industry that “generates billions of dollars in overall economic contribution” along the U.S. East Coast.⁹³ Similarly, in its 3rd Quarter, FY 2022 Council Report, NOAA OLE states that “the amended speed rule...[will] significantly impact” pleasure crafts.⁹⁴ The NMFS has estimated that “approximately 15,899 vessels would be affected by the proposed revisions to the current speed rule,” with the “largest proportion of the overall estimated cost of the proposed changes is borne by ocean-going commercial ships (35 percent) followed by passenger vessels (26 percent) and industrial work vessels (18 percent).”⁹⁵

However, the numbers projected by NMFS vastly underestimate the true number of vessels to be affected by this rule.⁹⁶ In fact, 2021 vessel registration data analyzed by

⁸⁹ Storm warnings are issued when winds are in the range of 55 mph to 73 mph, and hurricane warnings are issued when winds are 74 mph or higher. *Coastal Warning Display Program, Explanation of Warnings*, NOAA, National Weather Service, <https://www.weather.gov/marine/cwd#:~:text=GALE%20WARNING%3A%20A%20warning%20of,associated%20with%20a%20tropical%20cyclone> (last accessed Oct. 29, 2022).

⁹⁰ NMMA members include small vessel engineers, who attest to these safe design features.

⁹¹ Supplementary Information, North Atlantic Right Whale Vessel Strike Reduction Rule, Proposed Rule, NOAA (Aug. 1, 2022), <https://www.regulations.gov/document/NOAA-NMFS-2022-0022-0005>.

⁹² *Draft RIR*, at 14.

⁹³ NOAA claims that the “proposed revisions to the current speed rule [will have] an estimated cost at just over \$46 million per year.” *Id.*

⁹⁴ *NOAA OLE Council Report*, at 5.

⁹⁵ *Id.*

⁹⁶ 87 Fed. Reg. at 46,934.

Southwick Associates reveals more than 63,000 registered recreational saltwater vessels measuring 35-65 feet in states across the proposed zones.⁹⁷ Furthermore, an analysis of MRIP trip data from 2019-2021 shows that each year more than 70,000 recreational fishing trips in the 35-65 foot size class take place in the Atlantic Ocean more than three miles offshore in states with the proposed zones during the months when the speed restrictions would be in place.⁹⁸ As such, the economic impact analysis does not accurately portray the true economic impact to recreational vessels and lost fishing opportunities.

More significantly, the Proposal will deter boaters and fishers from taking trips altogether due to the time, cost, and safety burdens imposed by the rule. This, in turn, will negatively impact marinas, tackle shops, charter and party boat operations – all businesses that represent America’s small business economy.

Take, as one example, fishermen who must transit into the ocean’s pelagic zones to fish for species such as swordfish, tuna, and mackerel.⁹⁹ In certain long stretches of the Atlantic seaboard, these zones can exist far away from the coastline.¹⁰⁰ Fishing boats are tools designed to travel at speeds that enable fishermen to reach these zones in a reasonable time, thereby affording them several hours to fish before returning to shore. With this speed restriction in coastal waters, a trip to a pelagic zone up to 60 nautical miles offshore could take up to six hours *each way*. The Proposal would make it impossible to fish the pelagic zones and would devastate the offshore fishing industry and the small businesses that rely on it.

Another example, as mentioned above, is the effect this Proposal will have upon charitable organizations for which a significant source fundraising is derived from fishing tournaments and boat manufacturers. This rule would nearly eliminate all of the funding sources for these charities and, in turn, hinder the charitable activities undertaken in small coastal communities.

NMFS prepared a Draft Regulatory Impact Review (“Draft RIR”) and Initial Regulatory Flexibility Analysis (“IRFA”) to describe the economic impact of this Proposal, if adopted, would have on small entities (*i.e.*, individual vessels).¹⁰¹ The Draft RIR notes that

⁹⁷ See *Southwick Report* Appendix 1.

⁹⁸ *Southwick Report*, at 2.

⁹⁹ Travis Allan, *What are pelagic fish?*, National Ocean Service, NOAA, <https://oceanservice.noaa.gov/facts/pelagic.html> (last updated Feb. 26, 2021).

¹⁰⁰ Defined Fishery Management Areas Off South Atlantic States Map & GIS Data, NOAA Fisheries, <https://www.fisheries.noaa.gov/resource/map/defined-fishery-management-areas-south-atlantic-states-map-gis-data> (last updated Oct. 18, 2019).

¹⁰¹ 87 Fed. Reg. at 46,934.

“vessel types . . . designed for high-speed transmit . . . may be more substantially impacted,” but much of the analysis focuses on the cost of increased transit time, assuming that vessels will continue to transmit at all.¹⁰² Similarly, the IRFA fails to address the broader impacts upon the small business economy maintained by the recreational boating industry and is therefore severely deficient.¹⁰³ NMFS states that “[i]t is challenging to predict how different mariner groups might respond, adjust, or otherwise modify operations to accommodate” the Proposal.¹⁰⁴ NMMA believes that the more likely scenario is that boat operators will curtail or simply cease their small vessel activities altogether. NFMS must update the economic impact analysis to include the full range of economic impacts of the Proposal.

V. The Proposal Raises Serious Constitutional Concerns.

Finally, the Proposal raises serious constitutional concerns involving the separation of powers and the major questions doctrine, as well as the Fourth and Fifth Amendments. The Agency should reconsider the sweeping scope of a rule that will affect broad swaths of the coastal economy to ascertain whether it really has been granted such authority by Congress. While NOAA purports to minimize the economic impact of its rule, in reality the Proposal will render thousands of boats virtually worthless and practically inoperable. As such, this regulatory taking deprives boat owners of their property without due process and appropriate compensation under the Fifth Amendment. Finally, the proposed use of tracking technology to enforce the Proposal would access sensitive data that in many instances may be protected by the Fourth Amendment. In addition to the constitutional issues with the data, there is also the real possibility that boaters will turn off some of these devices, which will cause serious safety concerns.

A. The Enormous Scope of the Speed Rule Implicates both the Major Question and Non-Delegation Doctrines

Agencies cannot promulgate rulemakings with “vast economic and political significance” absent clear delegation of authority from Congress.¹⁰⁵ Here, NMFS is attempting to regulate “a significant portion of the American economy” – namely the fishing and recreational boating industries, and the coastal businesses and communities that rely on them – but NMFS cannot point to any “clear congressional authorization” to regulate in this proposed manner. NMFS relies on section 112(a) of the MMPA, which grants the Agency authority to promulgate regulations that are “necessary and appropriate” to carry out the law. 16 U.S.C. § 1382(a). The words “necessary and appropriate” provide no limiting principle

¹⁰² *Draft RIR*, at 8.

¹⁰³ *Id.* The IRFA limits its economic impact analysis to the specific whale watching tourism industry.

¹⁰⁴ *Id.* at 37.

¹⁰⁵ *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022).

or guidance on what NMFS can do, and they certainly do not clearly give NMFS authority to place such an onerous regulation on such a large swath of the economy. As such, to the extent Congress thought that language was sufficient to grant NOAA authority to regulate vessel speed and public access, it provides no intelligible principle by which the Agency can act.

On the other hand, while the MMPA includes extensive statutory provisions regarding commercial fishing regulations, it says nothing about general vessels and nothing about regulating the speed of private craft. The entire concept of the MMPA focuses on preventing “take” of marine mammals. The statute regulates so-called “incidental take” when focusing on commercial fishing, but says little or nothing about incidental take in other contexts. Nothing suggests that Congress intended for NOAA to impose limits on vessel speed over large segments of the eastern seaboard. As such, these proposed rules would violate the major question doctrine as articulated by the Supreme Court when it struck down EPA’s attempt to regulate power plants.¹⁰⁶

The Supreme Court has made clear that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.”¹⁰⁷ For NOAA to find the authority to regulate—indeed, to shut down—a large swath of the economy within the MMPA’s “necessary and appropriate” language would suggest that Congress had hidden the elephant in the mousehole.¹⁰⁸ Accordingly, NOAA should reconsider whether it has the authority to promulgate such a rule, particularly when it has not coordinated with other agencies, when it is acted on such a thin record, when it has not appropriately considered the economic impacts, and when it has failed to consider reasonable alternatives.

B. The Proposed Rule Would Effectuate the Regulatory Taking of Boats Everywhere.

Under the Fifth Amendment of the United States Constitution, private property shall not “be taken for public use, without just compensation.”¹⁰⁹ Although NMFS has not adequately considered the effect the Proposal will have on the ability of owners to use their small vessels and responsibly access public waters, it should be clear from what NMMA has explained above that the Proposal will make using small vessels very difficult if not impossible. As such, the Proposal runs the risk of being held to be an impermissible regulatory taking.

¹⁰⁶ *Id.*

¹⁰⁷ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001).

¹⁰⁸ *Id.*

¹⁰⁹ U.S. Constitution, Am. V.

This Proposal would be enforced along approximately 20,000 miles of the Atlantic coastline¹¹⁰ and across at least two thousand nautical miles of ocean,¹¹¹ where thousands of boat operators use their small vessels for recreation or for commercial fishing. These small vessels, which range in cost from \$150,000 to over \$15,000,000, have been purchased specifically for their design features and their speed capabilities. Restricting vessels to speeds of 10 knots per hour would render many of these small vessels “valueless.” In fact, this Proposal would effectively deprive boat owners and operators of all “economically viable use” of their property.¹¹²

The exact contours of when a rule amounts to a regulatory taking are not clear under the Supreme Court’s current jurisprudence. The Supreme Court has explained that the concept of “property,” for purposes of the Fifth Amendment, “denote[s] the group of rights inherent in the citizen’s relation to [a] physical thing,” and not just the physical thing itself.¹¹³ That group of rights includes the rights “to possess, use and dispose” of an item.¹¹⁴ The Proposal would dramatically reduce the ability of owners to “use” their vessels. At the very least, NMFS must consider how the speed restrictions will limit how vessels in the sub-65-foot category are used and whether what it perceives to be a nominal speed restriction will actually eliminate the ability to use the vessels at all or in most circumstances.

C. The Fourth Amendment Presents Serious Limitations on the Use of Transponders to Enforce the Proposed Rule.

The Fourth Amendment of the United States Constitution guards against unreasonable searches and seizures.¹¹⁵ While the exact contours of how NMFS will enforce

¹¹⁰ See Map of Proposed North Atlantic Right Whale Seasonal Speed Zones, NOAA Fisheries (July 29, 2022), <https://www.regulations.gov/document/NOAA-NMFS-2022-0022-0003> (last accessed Oct. 31, 2022); Shoreline Mileage of the United States, NOAA, <https://coast.noaa.gov/data/docs/states/shorelines.pdf> (last accessed Oct. 31, 2022).

¹¹¹ 87 Fed. Reg. at 46,929. NOAA does not calculate the exact nautical mileage over which the Proposal extends, but it states that “most zones [are] approximately 400 square nautical miles.” There are five proposed SSZs.

¹¹² Regulatory takings jurisprudence is muddled, and tests applied to restrictions on land-use are instructive. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)) (“[T]he Fifth Amendment is violated when land-use regulation ‘does not substantially advance legitimate state interests or denies an owner economically viable use of his land’” (emphasis in original)); see also *Maryland Shall Issue, Incorporated v. Hogan*, 963 F.3d 356 (2020) (Richardson, J., dissenting) (“A ‘classic’ taking occurs not only when ‘government directly appropriates private property,’ but also when it ‘ousts the owner’ of possession [...]”).

¹¹³ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945).

¹¹⁴ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (quoting *General Motors*, 323 U.S. at 378).

¹¹⁵ U.S. Constitution, Am. IV.

the rule are not clear, it is clear that many of the concepts presented will raise significant Fourth Amendment concerns that will leave the rule subject to challenge at the promulgation or enforcement stage.

Most of the vessels within the size class affected by this Proposal are not subject to USCG AIS carriage requirements. As such, NOAA acknowledges that in addition to the “ongoing enforcement challenges” of enforcing the existing rule, this Proposal will bring “new challenges” as the number of vessels subject to its restriction will dramatically increase.¹¹⁶ In advance of this rule, NOAA OLE has “upgraded capabilities for tracking vessel speed at sea, initiated research of new vessel tracking technologies, and started investigating land-based and aerial monitoring options.”¹¹⁷ The notice also states that “NMFS has also commenced staff level discussions with the U.S. Coast Guard regarding possible modification of current AIS carriage requirements to include additional vessel types and sizes.” It goes on to say that “NMFS is proposing changes to the speed rule specifically designed to enhance monitoring and enforcement,” and that this would include “using additional technologies to monitor vessel speed.” In short, NMFS appears to be planning a Big Brother approach that would include expanding the requirements for smaller craft to carry AIS, and then using the data collected to enforce the rule.

The Supreme Court has made clear that GPS location data, as well as cell phone tower data are both subject to the Fourth Amendment’s restrictions. As the Court stated: “[a]s with GPS information, the time-stamped [cell phone] data provides an intimate window into a person’s life, revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations.’”¹¹⁸ So too with AIS location and speed data for smaller vessels that have not historically been subject to the same requirements as larger, mostly commercial, vessels. As such, NMFS must pause and consider whether AIS data and other tracking mechanisms are actually permissible under the Fourth Amendment and the reasonable expectations of boaters about their privacy.

CONCLUSION

Protecting the right whale is important. No one, including NMMA and its members, doubts that. But NMFS’s broad and scientifically suspect approach is not the right answer. It will decimate the boating industry and those working in and around it. It will impair the ability of thousands of people to use their boats in a meaningful way and render their investments virtually worthless. The vast surveillance network contemplated to enforce the

¹¹⁶ 87 Fed. Reg. at 46,932.

¹¹⁷ *Id.*

¹¹⁸ *Carpenter v. United States* 138 S. Ct. 2206, 2217 (2018) (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

rule will infringe on people's reasonable expectations of privacy when using their boats. The agency seems to have considered none of this.

And yet, based on the information NMFS has used to craft the Proposal, the rule will likely do little to actually protect the right whale. NMFS should be applauded for its focus on an important part of the marine ecosystem. To accomplish the goal of preventing deaths of this species, the Agency should go back to the drawing board, consult with USCG and affected parties, and find a solution that will actually solve the problem. Otherwise, the Proposal will neither save the right whale nor survive in court.