



October 31, 2022

Ms. Janet Coit  
Assistant Administrator  
NOAA Fisheries  
1315 East West Highway  
Silver Spring, MD 20910

*Re: Proposed North Atlantic Right Whale Vessel Strike Reduction Rule, Docket No. 220722–0162, Docket ID: NOAA–NMFS–2022–0022*

Dear Assistant Administrator Coit:

The South Carolina Boating and Fishing Alliance (SCBFA) appreciates the opportunity to comment on the proposed rule referenced above (“Vessel Speed Rule”).<sup>1</sup> In addition to the comments provided below, SCBFA incorporates by reference the October 3, 2022 comments submitted by the National Marine Manufacturers Association (NMMA), Center for Sportfishing Policy (CSP), and other recreational fishing and boating interests including the September 2022 Southwick Associates study *Impact Analysis for Proposed Modification to the North American Right Whale Vessel Speed Rule* (“Southwick Associates Impact Analysis”), which is attached as Appendix A to that comment letter.

SCBFA is the united voice of boating and fishing in South Carolina. SCBFA brings together manufacturers, dealers, retailers, boaters, and anglers under one banner to grow and protect access to great water, great fishing, and the great experiences that make South Carolina’s waterways some of the best in America. Boating and fishing are top recreational activities for South Carolinians, and our state has some of the most popular brands of boat and fishing tackle manufacturers in the world headquartered here. They have a \$5 billion impact on our state and support 23,000 jobs. South Carolina is in the top 10 states in the country for boat registration per capita. We have tremendous natural resources that we do not take for granted. We want to protect public access to water while being good stewards of our resources. At the same time, our boating and fishing manufacturers are key economic drivers for the state. As a result, SCBFA has a substantial interest in and significant concerns with the proposed Vessel Speed Rule.

The National Marine Fisheries Service’s (hereinafter referred to as “NMFS” or “NOAA”) proposed rule is of unprecedented scope, implicating numerous complex scientific and commercial issues covering virtually the entire Eastern Seaboard. The proposal also involves many novel

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<sup>1</sup> *Proposed Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*, 87 Fed. Reg. 46921 (Aug. 1, 2022).

regulatory and logistical issues that, to date, have received little, if any, public scrutiny. As detailed below, this scrutiny is essential as NMFS has failed to adequately identify its authority to issue or enforce the rule under the current statutory and regulatory scheme. The absence of clear statutory authority for the proposed rule poses far-reaching constitutional, legal, administrative, and policy concerns that the proposal overlooks. Moreover, the information on which the proposal ostensibly is based is incomplete, and the information that is available does not support the sweeping expansion of the speed restrictions proposed. This is particularly the case for the waters off of South Carolina, where (despite SCBFA's repeated requests) NMFS has been unable to identify even a single instance of a 35' – 65' boat striking a North Atlantic Right Whale (NARW), let alone when traveling in excess of 10 knots. In addition, NMFS's economic analysis is fundamentally flawed and astonishingly limited, resulting in a severe undervaluation of implications to recreational boating and fishing and a clear underestimation of the overall economic impacts that would result. It is almost impossible to overstate the repercussions to South Carolina if the proposed Vessel Speed Rule is implemented. Put simply, it would decimate recreational offshore fishing, causing a devastating ripple effect throughout the state's economy.

For each of these reasons, if finalized as proposed, the Vessel Speed Rule would be ultra vires, arbitrary and capricious, and contrary to law. SCBFA urges NMFS to rescind the proposal and refocus its attention on measures the agency has authority to carry out, activities that actually present conservation concerns to the NARW, and locations where those concerns in fact exist.

### **I. NMFS Lacks Authority to Promulgate, Implement, and Enforce the Proposed Vessel Speed Rule.**

The proposed Vessel Speed Rule rests on a fundamental misunderstanding of NOAA's authority under the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). The proposal claims that "NMFS is proposing this rule pursuant to its rulemaking authority under MMPA section 112(a) (16 U.S.C. 1382(a)), and ESA section 11(f) (16 U.S.C. 1540(f))."<sup>2</sup> But neither the cited provisions nor any other section of the ESA and MMPA allow the agency to regulate the speed of the estimated 63,000+ boats (35' – 65') used for recreation in the waters off of the East Coast each year.<sup>3</sup>

Section 112(a) of the MMPA does not authorize NOAA to promulgate, implement, or enforce the proposed rule. That provision states only that "[t]he 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 this subchapter."<sup>4</sup> While the phrase "necessary and appropriate" generally is interpreted broadly, it is not limitless. Among other things, Congress made clear that NMFS's rulemaking authority is confined to issuing regulations that are necessary to administer Subchapter II of the MMPA. Congress used Subchapter II for many important things – establishing a moratorium on taking marine mammals, imposing strict prohibitions on unauthorized take, creating an incidental take permitting program, codifying a detailed framework for regulating federally-jurisdictional commercial fishing operations, and incorporating specific penalty and enforcement provisions – each of which is set

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<sup>2</sup> 87 Fed. Reg. at 46934.

<sup>3</sup> Southwick Impact Analysis at1, Table 2.

<sup>4</sup> 16 U.S.C. § 1382(a).

forth in acute detail.<sup>5</sup> Yet nowhere did Congress express or imply an intent for NOAA to impose precautionary regulations on private conduct that does not itself violate the clearly articulated provisions of the statute.

NMFS's reliance on Section 11(f) of the ESA is even more farfetched. That provision states in pertinent part that "[t]he Secretary [is] authorized to promulgate such regulations as may be appropriate to enforce this chapter . . . ."<sup>6</sup> Thus, the plain language of this provision confines NMFS's rulemaking authority to regulations that will further statutory enforcement. Prophylactic rules fall well outside that scope. Section 11(f) no more allows NMFS to impose a 10-knot speed limit on all boats  $\geq 35'$  than it authorizes the U.S. Fish & Wildlife Service to impose a 10-mph speed limit on all SUVs. No matter how well intentioned they might be, such precautionary regulatory restrictions simply are not "appropriate to enforce" the ESA and would stretch the statute's language far past anything Congress contemplated.

Beyond the unambiguous language of these statutory provisions, NMFS's own actions, as well as those of Congress and other federal agencies, further confirm that NOAA lacks regulatory authority for the proposal. In fact, on several occasions since 2000, Congress has considered statutory amendments that would grant the agency this authority. For example, in 2003, the Bush Administration proposed an MMPA reauthorization bill that, among other things, would authorize NMFS to issue regulations, like speed restrictions, aimed at reducing possible vessel strikes of NARW. During the corresponding Senate Hearing on the *Future of the Marine Mammal Protection Act*, agency witnesses testified specifically on this issue.<sup>7</sup> Those witnesses admitted that NMFS lacks the necessary authority and asked lawmakers to amend the statute accordingly:

- Dr. Rebecca Lent, Deputy Assistant Administrator for Fisheries at NMFS testified that "[t]he bill provides authorization to use authorities to reduce the occurrence of ship strikes on whales, a very big concern for right whales." She further testified that "[t]he 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."<sup>8</sup>
- David Cottingham, Executive Director of the Marine Mammal Commission, testified that "[t]he Administration bill highlights the ship strike issue as one requiring priority attention. One of the difficulties impeding progress in addressing this source of mortality is a lack of agreement concerning the existing legal authorities that can be brought to bear on the issue."<sup>9</sup>

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<sup>5</sup> *Id.* §§ 1371-1389.

<sup>6</sup> 16 U.S.C § 1540(f).

<sup>7</sup> S. Hrg. 108-981 (July 16, 2003).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* At least one other federal agency also has cautioned NMFS that it lacks authority to impose vessel speed restrictions. See 80 Fed. Reg. 62008 (Oct. 15, 2015) (noting that the U.S. Army Corps of Engineers commented on the current iteration of the Vessel Speed Rule that "NOAA lacks the legal authority to establish vessel speed restrictions and the authority lies instead with the Secretary of the Army and the ACOE under the 1894 Rivers and Harbors Act").

Notwithstanding these requests from NMFS and the Marine Mammal Commission, Congress did not pass the bill.

Since that time, several bills have been introduced in both the U.S. Senate and the U.S. House of Representatives (as recently as last year)<sup>10</sup> to bestow upon NOAA explicit regulatory authority to restrict vessel speed in the name of NARW conservation. But each time the measure failed. There is no reason members of Congress would repeatedly attempt to give an agency authority it already has. The only logical justification for these bills is that the agency lacks that power.

The absence of authority for NOAA to prophylactically regulate recreational boating activities is fatal to the proposed Vessel Speed Rule. As the U.S. Supreme Court has long recognized, federal agencies must confine their regulatory activities to the authority that Congress delegates to them by statute.<sup>11</sup> An agency may promulgate regulations, but only to fill a “gap” in the statutory text that Congress intended to leave to that agency’s discretion.<sup>12</sup> Where an agency lacks such discretion, the agency may ask Congress to expand the agency’s authority to address the new challenge, just as NMFS attempted to do under the MMPA.<sup>13</sup> However, when Congress decides to broaden an agency’s authority, it does so unambiguously, not by “hiding elephants in mouseholes.”<sup>14</sup> Congress has not done so here, and neither the MMPA nor the ESA provides NOAA with the remarkable power it attempts to wield with its proposal.

## **II. There is No Factual Basis for the Proposed Vessel Speed Rule.**

Even had Congress intended to cast aside basic legislative precepts to silently empower NOAA to promulgate sweeping prophylactic regulations under the ESA and MMPA, the agency remains bound by the strict rulemaking standards of the Administrative Procedure Act (“APA”).<sup>15</sup> The APA imposes important statutory safeguards against arbitrary and capricious agency action and requires federal regulations to bear a “rational connection between the facts found and the choice made.”<sup>16</sup> In other words, a federal agency may not rely on factors which Congress has not intended it to consider, ignore an important aspect of the problem, or attempt to justify its decision with explanation that runs counter to the evidence before it.<sup>17</sup> Agency decisions resulting from “illogical” or inconsistent reasoning,<sup>18</sup> that ignore an important factor relevant to the action,

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<sup>10</sup> See, e.g., S. 2657 (2008) (proposing to require NOAA to issue a rule imposing vessel speed restrictions and codify that rule under the MMPA); H.R. 5536 (2008) (same); H.R. 5957 (2021) (proposing to authorize NOAA to develop and implement vessel speed restrictions remarkably similar to the proposed Vessel Speed Rule).

<sup>11</sup> See, e.g., *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296-97 (2013).

<sup>12</sup> See, e.g., *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984).

<sup>13</sup> See, e.g., *U.S. v. Kaluza*, 2013 WL 6490341 at \*14 (E.D. LA 2013) (holding Congress broadened the meaning of terms under OCSLA Section 1333(a)(1) in 1978 to enable DOI to regulate platforms in light of new emerging technologies).

<sup>14</sup> See *United States Association of Reptile Keepers, Inc. v. Jewell*, 103 F.Supp.3d 133 (D.D.C. 2015) (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), and explaining that agencies should not infer an expansion on their own authority in the absence of any legislative mention that the scope of a statute has been adjusted).

<sup>15</sup> 5 U.S.C. §§ 701-706.

<sup>16</sup> *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983).

<sup>17</sup> *Id.*

<sup>18</sup> *Am. Fed'n of Gov't Emps., Local 2924 v. Fed. Labor Relations Auth.*, 470 F.3d 375, 380 (D.C. Cir. 2006).

including the policy effects of the decision and vital aspects of the problem at hand,<sup>19</sup> or that fail to consider “less restrictive, yet easily administered” regulatory alternatives<sup>20</sup> run afoul of the APA. Failing any one of these standards is grounds for vacating a federal regulation. The proposed Vessel Speed Rule fails them all.

First, the proposed rule is bereft of any rational connection to the underlying facts. As described in the proposal, NMFS intends to establish five enormous Seasonal Speed Zones (SSZs) that would blanket the Atlantic Ocean from the East Coast to as far as 90 miles offshore, a total area spanning over 50,000 square miles,<sup>21</sup> and impose an unprecedented 10-knot speed limit on all 35’ – 65’ boats feet traveling there for much of the year. NMFS claims that these measures will provide “necessary protection for right whales throughout the U.S. portions of their habitat.”<sup>22</sup> The facts simply do not bear that out.

Perhaps nowhere is this clearer than the waters off the coast of South Carolina. Under the proposal, NMFS would establish an SSZ for these waters (the “South Carolina SSZ”) encompassing nearly 6,600 square miles, and impose a 10-knot speed limit on all 35’ – 65’ boats traveling within it November 1 – April 15 each year. But nothing in the proposed rule or supplemental materials supports this anywhere off of the South Carolina coast. Indeed, NMFS identifies just a single recorded NAWR vessel strike as having ever occurred anywhere in South Carolina waters. That isolated incident occurred in 2011, the vessel involved was more than 65 feet long, and the vessel’s speed is unknown. In other words, NMFS claims that it must create the South Carolina SSZ and impose a draconian speed limit on all 35’ – 65’ boats within it to protect NAWRs, but it has not identified even a single instance of one of those boats ever striking a NAWR while traveling *at any speed* in the waters off the coast of South Carolina. The proposal therefore is trying to protect against something that has never happened. Nor is there any reason to think it might happen in the future. NMFS’s own modeling predicts a NAWR strike mortality risk of 0.00000 to 0.00003 for all vessels (including those >65’) for the overwhelming majority of the South Carolina SSZ.<sup>23</sup> As a result, there is no connection between the facts found and the proposed rule for South Carolina, let alone a rationale one.

The proposal also suffers from similar defects elsewhere in the Atlantic waters along the East Coast. NMFS misleadingly attempts to justify imposing a 10-knot speed limit on all 35’ – 65’ boats operating anywhere within the massive area stretching from Florida to Massachusetts because “[f]our of the five collision events involving vessels less than 65 ft [] in length occurred inside active SMAs.”<sup>24</sup> Careful examination of the proposal reveals that NMFS has not identified even one example of a 35’ – 65’ boat striking a NARW anywhere in the offshore waters between Ossabaw Island, Georgia and Elberon, New Jersey. Absent demonstrable evidence that boats in this size class present a legitimate and recurring risk to NAWRs, the proposal addresses nothing more than a hypothetical concern. The Administrative Procedure Act demands far more.

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<sup>19</sup> *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir. 2012).

<sup>20</sup> *Cin. Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995).

<sup>21</sup> Estimated area calculated from SSZ shapefiles provided by NMFS, available at <https://www.fisheries.noaa.gov/resource/data/proposed-right-whale-seasonal-speed-zones> (last visited Oct. 21, 2022).

<sup>22</sup> 87 Fed. Reg. at 46931.

<sup>23</sup> Lance P. Garrison, et al., Figure 8, “NOAA Technical Memorandum NMFS-SEFSC-757 Assessing the risk of vessel strike mortality in North Atlantic right whales along the U.S. East Coast”, at 30-35 (May 2022).

<sup>24</sup> 87 Fed. Reg., at 46924

Second, the proposed Vessel Strike Rule both “ignores an important aspect of the problem” and fails to consider “less restrictive, yet easily administered” alternatives. In particular, there is ample evidence, including from the agency itself, that NMFS has neglected almost entirely to enforce its 2008 rule restricting the speed of all vessels >65’ in order to protect the NARW from ship strikes. This is especially true in the waters off of South Carolina.

According to a July 2021 Oceana report, each year between 2017 and 2020, 85.7% to 89.6% of vessels >65’ flouted NMFS’s mandatory speed limit for that vessel size class within the South Carolina SSZ.<sup>25</sup> And that is not just a recent development. In the years immediately following NMFS’s implementation of that speed restriction, mariner compliance “was relatively low in 2009 and 2010” and “was consistently low in ‘foreign-flagged’ vessels.”<sup>26</sup> This longstanding administrative dereliction is meaningful. As NMFS now recognizes, “vessel compliance and effective enforcement is critical” to the rule’s effectiveness.<sup>27</sup>

Notwithstanding NMFS’s failure to enforce its current regulations, the agency complains that “despite [its] best efforts, the existing speed rule and associated vessel strike mitigation efforts are insufficient to reduce the level of lethal right whale vessel strikes to sustainable levels in U.S. waters.”<sup>28</sup> To substantiate that concern NMFS compared the 12 documented NARW vessel strike mortalities that occurred in the decade before the 2008 rule’s implementation, to the 8 documented NARW vessel strikes that occurred in the decade following.<sup>29</sup> These data are a non sequitur, however, due to the agency’s failure to enforce compliance with the rule. NMFS acknowledges as much: “it is not possible to establish a direct causal link between speed reduction efforts and the relative decline in observed right whale mortality and serious injury events following implementation of the [2008] speed rule.”<sup>30</sup> More pointedly, the agency’s own experts cautioned that the reduction in vessel-strike mortalities “was not coincident with the implementation of the vessel speed rules [as] compliance with speed restrictions was relatively low during [the review] period.”<sup>31</sup> Even NMFS’s Draft Environmental Assessment for the new proposal concedes that the “vast majority of [the 89% risk] reduction is expected to accrue from vessels equal to or greater than 65 feet that are currently subject to speed restriction.”<sup>32</sup>

Despite never having made a good faith effort to implement its 2008 rule, NMFS now wants to expand that rule by imposing a 10-knot speed restriction on all boats 35’ – 65’, violation of which would carry severe civil and even criminal penalties. And it proposes to do so knowing there is little reason to expect any conservation benefit in return. Simply stated, the proposed

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<sup>25</sup> Oceana, “Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales,” at 22, (July 2021), available at [https://usa.oceana.org/wp-content/uploads/sites/4/4046/narw-21-0002\\_narw\\_ship\\_speed\\_compliance\\_report\\_m1\\_digital\\_singlepages\\_doi\\_web.pdf](https://usa.oceana.org/wp-content/uploads/sites/4/4046/narw-21-0002_narw_ship_speed_compliance_report_m1_digital_singlepages_doi_web.pdf) (last visited Oct. 21, 2022).

<sup>26</sup> Silber, Gregory K., “An assessment of the final rule to implement vessel speed restrictions to reduce the threat of vessel collisions with North Atlantic right whales,” at *iv* (2012).

<sup>27</sup> 87 Fed. Reg. at 46932.

<sup>28</sup> NMFS, 2022 Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis (“RIR”), at 4.

<sup>29</sup> Garrison, *supra*, at 2-3 (2022).

<sup>30</sup> 87 Fed. Reg. at 46924.

<sup>31</sup> Garrison, *supra*, at 3 (2022).

<sup>32</sup> NMFS, “Draft Environmental Assessment for Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule,” at 42 (July 2022) (emphasis added).

Vessel Speed Rule puts the cart before the horse. NMFS has an obligation to diligently enforce its existing regulations before considering whether there is any need to expand them.

Third, the proposed Vessel Speed Rule is the result of “illogical and inconsistent reasoning.” Among other things, NMFS’s vessel strike risk calculation clearly is flawed and exaggerates the risk to NARW from 35’ – 65’ boats. As explained in the Draft Environmental Assessment, the agency developed its collision risk models for these smaller boats using data “primarily from vessels greater than or equal to 65 ft in length.”<sup>33</sup> And although it recognized that this “may be less appropriate for some of the vessels less than 65 ft in length included in the current analysis,” NMFS chose not to develop a model that could analyze potential risk from 35’ – 65’ boats. Compounding this problem, NMFS inexplicably calculated strike risk from those smaller boats based on the amount of time a whale typically is expected to swim within 10 meters (32.8 feet) of the water surface.<sup>34</sup> That is wholly irrational for boats in the 35’ – 65’ size class given that none of them have a maximum draft of even a quarter of that depth. Based on a survey of SCBFA’s boat manufacturer and retailer members, the maximum draft of boats in this size class with outboard motors is less than five feet, while sportfish boats do not draft more than six feet. Even the 63’ Viking Motor Yacht has a maximum draft of 5.58 feet. Moreover, the maximum draft depths for all of these boats occurs when they are immobile. To reduce resistance and increase fuel economy, boats in this size class are designed specifically to rise in the water as speed increases. As a result, subjecting these boats to a 10-knot speed limit actually would increase the exposure of NAWRs to a potential encounter, while prolonging the duration of that exposure. This result is exactly the opposite of what NMFS hopes to accomplish.

Lastly, the proposed Vessel Speed Rule makes clear that NMFS relied “on factors which Congress has not intended it to consider.” In particular, the proposal cites a variety of unrelated and irrelevant benefits that it anticipates will accrue from subjecting 35’ – 65’ boats to a 10-knot speed limit.<sup>35</sup> Most notably, NMFS claims that its proposal will support the Biden Administration’s climate change agenda:

[F]or certain vessel types, the proposed rule is expected to result in reduced fuel use, and thus emissions, by slowing more vessels over a larger net spatial and temporal area compared to current conditions. NMFS anticipates these reductions would contribute to enhanced air quality, and support lower fossil fuel emissions, a priority for climate change mitigation, benefiting both human health and marine species.<sup>36</sup>

In addition to being wrong for 35’ – 65’ boats, which generally achieve maximum fuel efficiency at cruising speeds well above 10 knots, this is irrelevant and inappropriate for NMFS to consider. NOAA has no authority to regulate or justify its regulations on fuel consumption, emissions, or climate change considerations. Doing so is the height of ultra vires agency action and further undermines the legal predicate for the proposal.

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<sup>33</sup> Draft EA, at 18.

<sup>34</sup> 87 Fed. Reg. at 46925.

<sup>35</sup> *Id.* at 46932.

<sup>36</sup> *Id.*

### III. The Proposal's Economic Impact Analysis is Flawed and Deficient.

The economic impact analysis for the proposed Vessel Speed Rule is fatally flawed, enabling NMFS to ignore, minimize, and mischaracterize the grave economic consequences that the rule will cause. Of special concern to SCBFA, despite recognizing that “[r]ecreational fishing is widely enjoyed and generates *billions of dollars* in overall economic contribution along the U.S. East Coast,” NMFS inexplicably concludes “that the seasonal nature of most speed restrictions will minimize the impacts of the proposed rule on recreational activities.”<sup>37</sup> Nothing could be farther from the truth. The Vessel Speed Rule poses an existential threat to recreational offshore fishing in South Carolina and elsewhere along the East Coast. NMFS’s analysis does not show that, however, because it relies on incomplete, irrelevant, and misleading data that bear no rational connection to the actual effects that would result if NMFS finalizes the rule as proposed.

NMFS analyzed economic impacts by trying to identify the number of 35’ – 65’ boats used primarily for a particular activity (e.g., recreation) that the agency believes would be subject to the new speed restrictions in the proposed Seasonal Speed Zones and Dynamic Speed Zones (DSZs) along the East Coast.<sup>38</sup> According to NMFS, 6,488 recreational boats of this size would be regulated in the SSZs under the proposed rule, and these boats would experience rule-based travel delays of 22,718 hours in the Northeast/Mid-Atlantic SSZs and 8,088 hours in the Southeast SSZs.<sup>39</sup> NMFS then made a perfunctory attempt to monetize these delays into an estimated economic impact by multiplying the hours of delay by an average wage rate (\$28.20/hour) for the expected occupant(s) of the boats.<sup>40</sup> Using this formula, NMFS estimated that 35’ – 65’ recreational vessels would incur a total economic impact of \$868,722 from the new speed limit in the SSZs (\$640,649 for the Northeast/Mid-Atlantic and \$228,073 for the Southeast).<sup>41</sup> This would make recreational vessels “the most impacted vessel type of this size class in SSZs.”<sup>42</sup> NMFS relied on the same approach to estimate the economic impact associated with the proposed DSZs. The agency identified 1,640 recreational vessels (35’ – 65’) that it believes would be impacted, resulting in 5,164 hours of delay for the occupants of these boats, or an economic impact of \$145,617 for recreational boats.<sup>43</sup> Finally, NMFS added together its SSZ and DSZ estimates and proclaimed that the total impact of the proposal on recreational activity would be \$1,014,339.<sup>44</sup> This methodology and the agency’s resulting conclusions are fanciful at best.

As an initial matter, NMFS severely underestimated the number of recreational vessels that would be affected by the proposal. There are more than 63,000 registered recreational boats (35’ – 65’) that operate within the proposed Speed Zones – 56,000 more than NMFS estimated. The Southwick Associates Impact Analysis, which SCBFA incorporates into these comments by reference, found that over 19,000 non-commercial saltwater fishing boats (35’ – 65’) make approximately 70,000 trips into these areas each year during the period of the proposed seasonal

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<sup>37</sup> 87 Fed. Reg., at 46931 (emphasis added).

<sup>38</sup> RIR, Appendix A, at 31.

<sup>39</sup> *Id.* at 31.

<sup>40</sup> RIR, Appendix A, at 11.

<sup>41</sup> *Id.*, at 33.

<sup>42</sup> RIR, at 31.

<sup>43</sup> RIR, Appendix A, at 33-34.

<sup>44</sup> *Id.* at 34.



restriction.<sup>45</sup> These trips alone have an annual value of \$15 million, and many of them would be canceled because extensive delays from the new speed limit would make it impossible for recreational anglers in many locations to fish productive offshore waters in a single day.<sup>46</sup>

In South Carolina, the consequences would be staggering. Due to the orientation of the East Coast, the productive offshore waters for recreational fishing are found 45-70 miles off of the South Carolina coastline. Recreational vessels therefore must leave the dock by 4:00 a.m. to have enough time to travel to those locations, fish for a few hours, and then make the return trip home in a single day. But the proposed speed limit would make such daytrips impossible from the South Carolina coast for six months of every year, including during the heart of the offshore recreational fishing season. As a result, the continuing vitality of recreational offshore fishing in South Carolina hangs in the balance.

The ability to complete recreational offshore fishing trips in a single day is not a matter of mere convenience; it is a necessity. The majority of recreational fishing boats are not designed or equipped for overnight stays in the open ocean by multiple occupants. Even for the minority of recreational boats that are designed and equipped for this, the human safety risks skyrocket with an overnight stay, particularly because the boats would be adrift in active shipping lanes and occupied by families and passengers who, for the most part, are not professional mariners. Prolonging these trips also increases the likelihood of encountering dangerous weather and other perilous conditions. And while the proposal includes an exception for responding to “emergency situations,” that does nothing to mitigate the enhanced risk of an emergency arising in the first instance.<sup>47</sup>

In addition to the added safety concerns, overnight offshore trips simply are not an option for many recreational anglers due to work and family obligations. Moreover, the unavailability of daytrips would make offshore fishing cost prohibitive for most recreational anglers who do not own a boat and depend on charter fishing operators, which generally charge an hourly rate. In sum, the proposed rule would transform the time-honored, family-friendly recreation enjoyed by tens of thousands each year into an avocation for a limited number of wealthy enthusiasts.

With offshore fishing being out of reach for most of South Carolina’s recreational anglers, those who own 35’ – 65’ boats will no longer have any use for them. Those who charter their offshore trips will have little option but to scuttle future plans in South Carolina. The impact will be swift, long lasting, and significant. The state’s robust charter fishing industry will dry up. The owners of both private and charter boats no longer will have any need for them, causing many to sell their boats at drastically deflated prices – if they are lucky enough to find a buyer who has a use for an offshore fishing boat that cannot be used for offshore fishing. Future sales of these boats

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<sup>45</sup> Southwick Associates Impact Analysis, at 2.

<sup>46</sup> *Id.* The proposal also entirely ignores impacts from the abandonment or alteration of the roughly 52,000 additional inshore and nearshore fishing trips made by 35’ – 65’ boats each year. *Id.*

<sup>47</sup> 87 Fed. Reg. at 46936. Separately, SCBFA requests that NMFS clarify explicitly that the “emergency situations” exception includes dangerous weather conditions that present “a threat to the health, safety, or life of a person” but are not within the scope of the proposed “National Weather Service Warning” exception described in Section 224.105(b)(3) of the proposal. A variety of dangerous weather conditions – including lightning, waterspouts, and Special Marine Statement-caliber storms – do not trigger NWS warnings of the sort described in the proposal, but they still pose significant life safety risks that require evasive action.

will plummet. These impacts are not speculative or hypothetical. The rule was only recently proposed and is still months away from possible implementation, but the NMMA reports that already “\$8 million worth of sales [] have been lost because of the threat of the rule.”<sup>48</sup> SCBFA’s manufacturer and retailer members also confirm that the proposal already is causing economic damage and believe NMMA’s estimate might even underestimate the proposal’s impact to date.

The effects will ripple across South Carolina’s economy. Beyond the direct costs to boat manufacturers and retailers, businesses across the state that support recreational fishing activities will experience massive losses. Instate sales of offshore fishing rods, reels, tackle, and other equipment will nosedive. South Carolina’s marinas, which rely heavily on income from monthly and annual docking fees and fuel sales, will suffer major financial hardship. To put this into perspective, monthly docking fees in South Carolina are typically \$15 - \$25 per vessel foot. The loss of just one 35’ boat would cost the local economy a minimum of \$6,300 in annual docking fees alone. Dock builders will experience decreased demand, and purchases of marine grade lumber will drop. In addition, because many recreational offshore anglers do not live at or near the coast, South Carolina’s all-important hospitality and tourism industries will suffer greatly. Last, but certainly not least, local governments will lose significant tax dollars that they depend on to support their budgets. On top of the sudden loss of sales and hospitality tax revenue, county governments would be out millions of dollars each year in property tax revenue because every South Carolina boat owner must pay an annual 10.5% county property tax on the value of their boat and, separately, on each motor. NMFS’s analysis overlooks every one of these.

Instead of accounting for these foreseeable impacts, NMFS relied on “appl[ying] the most recent national average wage rate from the Bureau of Labor Statistics as the opportunity cost for slowing down in active [SSZs].”<sup>49</sup> NMFS used the average wage rate of \$28.20 per hour. Even if this approach could account for the innumerable far-reaching economic effects that the Vessel Speed Rule will create, it still would be illogical and arbitrary. The opportunity cost of recreational activity cannot be limited to only an average wage rate. In South Carolina alone, there are at least 473 registered recreational saltwater fishing vessels in the 35’ – 65’ size class, and they represent an estimated 1,208 trips per year that would be impacted by the proposed rule.<sup>50</sup> In just angler spending alone, this would cost the recreational fishing industry at least \$233,417.00, which does not include impacts from cancelled or shortened trips and reduced expenditures in coastal economies.<sup>51</sup> NMFS must consider these direct costs, associated multiplier effects, and impacts to coastal businesses and governments in its impacts analysis.

Moreover, NMFS incorrectly based its economic analysis on average speed data and focused only on prolonged travel times. As discussed above, for those that still would be able to go offshore fishing once the Vessel Speed Rule is implemented, travel delays represent only a fraction of the additional time that would be required in the absence of recreational daytrips.

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<sup>48</sup> [https://www.tradeonlytoday.com/industry-news/nmma-proposed-speed-rule-an-existential-threat-to-industry?utm\\_campaign=Trade%20Only%20Today%20Newsletter&utm\\_medium=email&hsmi=227883288&hscnc=p2ANqtz--gx5oafXhu4PWeMxKWNukCaMXwTdSLt35AWkJP4kWppC5KqwSgOYOjzXN-pjOTWoZbuXX7X\\_Kbai7zTAHeRmYukYyVOQ&utm\\_content=227883288&utm\\_source=hs\\_email](https://www.tradeonlytoday.com/industry-news/nmma-proposed-speed-rule-an-existential-threat-to-industry?utm_campaign=Trade%20Only%20Today%20Newsletter&utm_medium=email&hsmi=227883288&hscnc=p2ANqtz--gx5oafXhu4PWeMxKWNukCaMXwTdSLt35AWkJP4kWppC5KqwSgOYOjzXN-pjOTWoZbuXX7X_Kbai7zTAHeRmYukYyVOQ&utm_content=227883288&utm_source=hs_email) (last visited Oct. 24, 2022).

<sup>49</sup> RIR, Appendix A, at 11.

<sup>50</sup> Southwick Associates Impact Analysis, at 5, 7.

<sup>51</sup> *Id.* at 2, 7-8.

NMFS also acknowledges that the U.S. Coast Guard AIS data used in the analysis “are biased and not a representative sample of vessels <65 feet operating in active SMAs” because most boats within the affected size class are not subject to AIS carriage requirements.<sup>52</sup> NMFS attempted to fill this void by relying on registration data for 35’ – 65’ boats, but it neglects to explain how the agency assigned speeds to those boats and why the assumed speeds used are reasonable and appropriate.<sup>53</sup> In any event, it is clear that the total annual delay of 4.42 hours per recreational vessel that NMFS applied to these boats everywhere along the Eastern Seaboard is a gross underestimation. Thus, in addition to the overall economic analysis being overly constrained and incomplete, NMFS’s reliance on this vague approximation for that analysis is indefensible.

#### **IV. NMFS Currently is Incapable of Enforcing the Proposed Rule, and Its Strategy for Rectifying that Would Be Unconstitutional.**

As explained above, NMFS has proven incapable of enforcing the current regulatory speed limit on vessels >65’ despite that it applies to a limited universe of vessels operating in a smaller area than enforcement of the new proposed rule would require. Dramatically expanding the number of covered vessels and the Speed Zone areas in which the restrictions apply would only aggravate this problem. NMFS concedes as much: “inclusion of vessels equal to or greater than 35 ft in length under the proposed rule will involve some increased enforcement costs since many vessels in this size are not equipped with AIS and cannot be monitored in the same way as AIS-equipped vessels.”<sup>54</sup> In view of NMFS’s position that “vessel compliance and effective enforcement is critical to the effectiveness of the proposed rule,”<sup>55</sup> the agency all but admits that it will be unable to enforce the new Vessel Speed Rule, which would prevent the measure from accomplishing its purported conservation purposes.

But NMFS tries to reassure the regulated community that it has a plan to fix this problem. The agency “has 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.”<sup>56</sup> This is a startling admission. NMFS not only wants to monitor AIS transceivers for the sole purpose of civil and criminal enforcement of the MMPA and ESA, but also to subject thousands of new vessels to AIS transceiver carriage requirements so that the agency can track their compliance and take action on noncompliance. If NMFS carries through with this plan, it would be contrary to law, stand as a chilling infringement on the protections secured in the Fourth Amendment to the U.S. Constitution, and be arbitrary and capricious.

The use of AIS data for civil and criminal enforcement of species conservation laws is well outside the scope of what Congress intended or authorized under the Marine Transportation Security Act (MTSA).<sup>57</sup> Congress passed the MTSA in the wake of the September 11, 2001

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<sup>52</sup> RIR, at 21.

<sup>53</sup> See RIR, at 21.

<sup>54</sup> *Id.*

<sup>55</sup> 87 Fed. Reg., at 46932.

<sup>56</sup> *Id.*

<sup>57</sup> See 46 U.S.C. § 70114. Authority to implement AIS-related regulations under the MTSA is delegated to “the Secretary of the department in which the Coast Guard is operating.” *Id.* § 70101(6). The Coast Guard is located administratively within the Department of Homeland Security (“DHS”), and DHS is the agency that has historically promulgated regulations related to AIS on boats. See 33 C.F.R. § 164.46.

terrorist attacks because ports “are often very open and exposed and are susceptible to large scale acts of terrorism...” and it “is in the best interests of the United States...to increase intelligence collection on cargo and intermodal movements to address areas of potential threat to safety and security.”<sup>58</sup> To address this concern, the MTSA requires that certain vessels be equipped with AIS technology, including commercial vessels of at least 65 feet in length.<sup>59</sup> The statute also authorizes the responsible agencies to mandate AIS for other vessels if they determine that doing so “is necessary for the safe navigation of the vessel.”<sup>60</sup> But there is no reasonable construction of these provisions that could justify using AIS data or expanding AIS carriage requirements to enable civil and criminal enforcement of regulations allegedly designed to protect the NARW.

Moreover, NMFS’s enforcement strategy would violate the Fourth Amendment to the U.S. Constitution, which protects the public from unreasonable search and seizure.<sup>61</sup> The Fourth Amendment applies anywhere an individual has a reasonable expectation of privacy and extends to private property (such as boats) in public locations.<sup>62</sup> The U.S. Supreme Court has confirmed that the Fourth Amendment’s protections apply when law enforcement uses location tracking data to assist with enforcement of criminal statutes, including by tracking the movement of private vehicles.<sup>63</sup> These protections are implicated so long as tracking information is being used for law enforcement purposes, even by a regulatory agency.<sup>64</sup> NMFS’s plan could never survive constitutional review.

Finally, even if using AIS data for MMPA and ESA enforcement purposes would not violate the MTSA and directly contravene the U.S. Constitution, it still would be inappropriate. The U.S Coast Guard has consistently recognized that AIS information is notoriously unreliable.<sup>65</sup> “As with GPS or DGPS, AIS is a useful tool in terms of electronic evidence collection . . . However, AIS is prone to inaccuracies and errors in various data fields, so investigators should take that into consideration.”<sup>66</sup> In the face of these known shortcomings, it would be arbitrary and capricious for NMFS to use AIS data for this unintended purpose.

For each of these reasons, NMFS must immediately abandon any thoughts of using AIS data to enforce the proposed Vessel Speed Rule.

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<sup>58</sup> Pub. L. 107-295, Nov. 25, 2002, title I, Sec. 101 “Findings” (7), (13)(F).

<sup>59</sup> 46 U.S.C. § 70114(a).

<sup>60</sup> *Id.*

<sup>61</sup> U.S. Const. amend. IV.

<sup>62</sup> *United States v. Jones*, 565 U.S. 400, 406-08 (2012).

<sup>63</sup> *See United States v. Jones*, 565 U.S. 400 (2012) (holding police violated the Fourth Amendment when they used a GPS to track an individual’s car without a warrant); *Carpenter v. United States*, 138 S.Ct. 2206 (2018) (holding police must obtain a warrant supported by probable cause before using cell phone location data to track the movements of a criminal suspect).

<sup>64</sup> *See, e.g., Brennan v. Dickson*, 45 F.4th 48, 62-64 (D.C. Cir. 2022) (holding an FAA regulation requiring private drone operators to submit their drones to tracking implicated the protections of Fourth Amendment and would be unconstitutional if law enforcement personnel accessed data collected).

<sup>65</sup> *See, e.g., Mark DeJesus, Electronic Evidence*, THE COAST GUARD JOURNAL OF SAFETY AND SECURITY AT PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, Winter 2015-2016 at 24.

<sup>66</sup> *Id.*

**V. NOAA’s Eleventh Hour Release of New Information is Inappropriate, and NMFS Still Has Not Provided Crucial Information Requested Over Two Months Ago.**

In an apparent last-minute attempt to justify the proposed Vessel Speed Rule, just two weeks before the close of the public comment period, NOAA released new information about a NARW “Unusual Mortality Event” opened in 2017 that ostensibly bears on the proposal (i.e., vessel strikes).<sup>67</sup> The agency has not posted this information on the rulemaking docket or on the agency’s website for the proposed rule.<sup>68</sup> Nor has NMFS explained how, if at all, this new information might be relevant. As a result, the public has not been alerted to the existence of this new information and whether NMFS believes it has any relevance to the proposal. It therefore would be inappropriate to rely on this information without first providing formal notice to interested stakeholders and an opportunity for public comment.

SCBFA discovered this new information by happenstance, and we have only been able to review it preliminarily. Nevertheless, even a cursory examination shows that this information provides no support for the proposed Vessel Speed Rule, particularly in the Southern Atlantic and areas off of the South Carolina coast. The information summarizes 36 observed NARW morbidities from 2017 to 2022 and lists the causes of each: 28 entanglements; 4 poor body conditions of unknown origin; 3 injuries of unknown origin; and one vessel strike.<sup>69</sup> The single vessel strike occurred in February 2020, and the affected NARW was observed near Cape Cod Bay, Massachusetts. But there is no information provided on the vessel size, vessel speed, or the location the strike reportedly occurred, and it would be inappropriate for NMFS to use this information to support the proposed rule.

In stark contrast, NOAA and NMFS still have not made available the most basic information about the proposed rule requested by SCBFA and others during the August 2022 public meetings and again in SCBFA’s September 7, 2022 letter requesting an extension of the public comment period. As explained in that letter, which was posted to the rulemaking docket, SCBFA asked NMFS for information about any vessel strikes occurring off of the South Carolina coast, the date of any such strikes, the approximate distance from the coast, the vessel size, and the vessel speed. NMFS representatives acknowledged in August that this information is not found in the materials that are available for public review and committed to posting this information and additional data on NMFS’s website. To date, however, the agency has not done so. The absence of this information continues to deny SCBFA and other public stakeholders a meaningful opportunity to evaluate and comment on key underpinnings of the proposal. SCBFA therefore reiterates its requests that this information be made available and that sufficient time be provided to the regulated community to review and comment on this crucial information.

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<sup>67</sup> See <https://www.fisheries.noaa.gov/feature-story/thirty-six-morbidity-cases-added-north-atlantic-right-whale-unusual-mortality-event>.

<sup>68</sup> See <https://www.fisheries.noaa.gov/action/amendments-north-atlantic-right-whale-vessel-strike-reduction-rule> (last visited Oct. 24, 2022).

<sup>69</sup> <https://media.fisheries.noaa.gov/2022-10/North%20Atlantic%20Right%20Whales%20Morbidity%20%28Sublethally%20Injured%20Cases%20Tables.pdf> (last visited Oct. 24, 2022).