EXAMINING THE IMPACTS OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION'S PROPOSED CHANGES TO THE NORTH ATLANTIC RIGHT WHALE VESSEL STRIKE REDUCTION RULE

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON WATER, WILDLIFE AND FISHERIES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

Tuesday, June 6, 2023

Serial No. 118–34

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.govinfo.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE
52–520 PDF WASHINGTON : 2023

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OVERSIGHT HEARING ON EXAMINING THE IMPACTS OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION'S PROPOSED CHANGES TO THE NORTH ATLANTIC RIGHT WHALE VESSEL STRIKE REDUCTION RULE

Tuesday, June 6, 2023
U.S. House of Representatives
Subcommittee on Water, Wildlife and Fisheries
Committee on Natural Resources
Washington, DC

The Subcommittee met, pursuant to notice, at 10:15 a.m. in Room 1324, Longworth House Office Building, Hon. Cliff Bentz [Chairman of the Subcommittee] presiding.

Present: Representatives Bentz, Wittman, Graves, LaMalfa, Webster, González-Colón, Carl, Luna, Hageman, Westerman; Huffman, Peltola, Hoyle, Magaziner, and Porter.

Also present: Representatives Carter, Collins, Mace, and Rutherford.

Mr. BENTZ. The Subcommittee on Water, Wildlife, and Fisheries will come to order.

Good morning, everyone. I want to welcome our witnesses, Members, and our guests in the audience to today's hearing.

The Subcommittee is meeting today to hear testimony on a hearing entitled, "Examining the Impacts of the National Oceanic and Atmospheric Administration's Proposed Changes to the North Atlantic Right Whale Vessel Strike Reduction Rule."

Without objection, the Chair is authorized to declare a recess of the Subcommittee at any time.

I ask unanimous consent that all other Members' opening statements be made part of the hearing record if they are submitted in accordance with Committee Rule 3(o).

I also ask unanimous consent that the gentlemen from Georgia, Mr. Collins and Mr. Carter; the gentlewoman from South Carolina, Ms. Mace; and the gentleman from Florida, Mr. Rutherford, be allowed to participate at today's hearing.

Without objection, so ordered.

I now recognize Chairman Westerman for his opening statement.

STATEMENT OF THE HON. BRUCE WESTERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Mr. WESTERMAN. Thank you, Chairman Bentz, and thank you so much for holding this very important hearing.

This hearing is, in my opinion, about a lot more than just a speed restriction rule in the Atlantic. I think this hearing goes

much deeper and gets into the core of a problem in our system of government today, and that is where we have bureaucrats who are making laws that Congress never made, low-level bureaucrats that don't answer to political appointees in either administration, and this is what happens when you get a bureaucratic administrative state that is out of control.

I have often said that conservation is an unchosen obligation to leave our world in a better condition than we found it. And as a lifelong outdoorsman, I believe that sportsmen and women are often the greatest conservators, because we inherently understand what it means to respect God's creation and to take care of it.

Of course, in order to enjoy the outdoors, we need to be able to access the incredible natural resources of our planet. Whether it is for fishing or hiking, Federal lands and waters belong to every American, and we should all be able to enjoy the land our creator gave us. That is why the proposed rule we are examining today is deeply concerning.

I have heard from many stakeholders, some who are testifying today, about the impacts of the proposed rule and how that will have negative effects on their families, their communities, and industry. Instead of engaging with these communities before drafting the proposed rule, NOAA chose to ram policies through without any regard for their impacts, acting like they live in their own little fiefdom over there, and they can make whatever rule they want without any consequences. Time and again, the Biden administration has proven that they would rather use a sledge hammer than a scalpel.

No one is suggesting that right whales do not deserve protection. However, there are alternatives to shutting down the entire East Coast or exposing our boating community to dangerous situations. And a question I have is, what is actually happening to the right whales? Because this Committee had requested a study from GAO because NOAA or nobody else can tell you what is actually happening. They want to find the scapegoat and blame it on somebody else, so we actually commissioned a study to see what is happening to the whales on the East Coast.

This proposed rule would devastate coastal communities and harm boating businesses and their workers without even helping the whale.

To put this issue into perspective, an estimated 63,000 recreational salt water vessels measuring above the length limit are registered in states across the proposed impact area. Stakeholders estimate that the economic impact of canceling boating and fishing trips as a result of the proposed rule could put 340,000 American jobs and nearly $84 billion in economic contributions in jeopardy. If there is a job lost over this rule, it should be the jobs of the people at NOAA that are proposing the rule.

It is time we figured out how to walk and chew gum at the same time. We can protect the right whale without resorting to extreme restrictions that cost Americans and prohibit outdoor enthusiasts from being on the water. I am glad that we are conducting an essential oversight of this proposed rule today. I hope we can have a productive dialogue on how to move forward while simultaneously stewarding our resources while allowing access.

I want to thank the witnesses for joining us today to share your testimony on the matter. I look forward to hearing it, and look forward to the discussion period.

With that, Mr. Chairman, I yield back.

Mr. BENTZ. Thank you, Chairman Westerman. I now recognize Ranking Member Huffman for his opening statement.

STATEMENT OF THE HON. JARED HUFFMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HUFFMAN. Thank you, Mr. Chairman.

The Subcommittee is today examining the proposed amendments to NMFS' Vessel Speed Rule, which aims to protect the critically endangered North Atlantic right whale.

Frankly, I am disappointed to hear what we just heard from the Chairman. You can disagree with a proposed regulation, you can have a spirited debate about what it ought to look like. But the kind of extreme hyperbole and highly personalized invective that we just heard, frankly, does a disservice to this complicated and vexing issue that we are trying to tackle.

So, I am also confused by what seems like a bit of a split personality disorder across the aisle. Republicans seem to be very worried about protecting whales when it serves their interests, when they want to stop offshore wind. But today we are hearing fierce opposition to a regulation that NMFS is trying to develop in a sensible, science-based way to update a rule that focuses on the leading cause of death of North Atlantic right whales, the one thing that we have to do something about if we want to keep this animal from going extinct on our watch.

Now, no one disputes that the right whale is on the brink of extinction. There are fewer than 340 individuals left, and the science points to the importance of two critical concepts in this conversation. The first is potential biological removal. The second is documented versus actual mortality.

Regarding the first, the Marine Mammal Protection Act and the ESA leaves NMFS no choice. They must ensure in this situation that human-related deaths of right whales stays below an annual rate of .07. That is less than one per year. This metric is known as potential biological removal, or PBR. In plain English, if we don't want the North Atlantic right whale to go extinct, we must prevent all human-caused whale deaths every single year until the population recovers.

The second concept, documented versus actual mortality. Scientists estimate that documented mortalities are just a fraction, about a third, of the actual whale deaths. We will never be able to find and record every dead whale, but we do know there are more deaths than we are able to document, so we need to err on the side of protection, again, if we want to avoid extinction of this iconic species.

The current annual loss of right whales is out of balance with the acceptable PBR level. We know that the deaths are primarily due to vessel strikes and fishing gear entanglements. The original 2008 Vessel Speed Rule incorporated at the time what we thought was best available science on whale presence, seasonal patterns, the

speeds at which vessels pose the greatest risk. And here we are, 15 years later, and our science has gotten stronger.

There is a 2021 NMFS study conducted during the Trump administration that revealed that lower vessel speeds were effective in reducing lethal vessel strikes and improving the chances of survival. But that study also highlighted the insufficiencies of the current rule.

Smaller vessels traveling at higher speeds continue to cause whale deaths. That is just a fact. And compliance with larger ships with involuntary slow zones has been low. So, during this period there were 12 documented whale deaths and serious injuries from vessel strikes in U.S. waters. And remember, this likely represents only about a third of what has actually happened out there, documented versus actual mortality.

Vessel strikes are particularly damaging because they disproportionately affect females and mother-calf pairs. So, again, this is something we have to do something about if we want to keep this species from going extinct.

And that brings us to the proposed rule, which strengthens protections for the North Atlantic right whale. It enhances safety protocols for vessels, incorporates spatial and seasonal limits, and includes smaller vessels, not because anybody wants to inconvenience smaller vessels, but because the facts show that they are known to contribute to whale mortality.

Remember, if we don't act we are looking at the extinction of one of the planet's largest whale species. Without additional measures, this whale could be functionally extinct by 2037. I hope none of us in this room are willing to accept that fate.

I look forward to the conversation today, Mr. Chairman, and I yield the balance of my time.

Mr. BENTZ. Thank you, Ranking Member Huffman. I now recognize myself for my opening statement.

STATEMENT OF THE HON. CLIFF BENTZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. BENTZ. I think the issue we face today, in general, is how we address a situation where a species is in danger. We all acknowledge that the right whale is in danger on the one hand, and what society is going to do about it on the other. I expressed this to Ms. Coit, Deputy Administrator for NOAA, in our conversation last week, where I said, "well, wouldn't the whale be safer if we just stopped all activity off the coast? Wouldn't the whale be safest if we just didn't allow any boating or any marine traffic whatsoever?"

And her answer, of course, was, well, she wasn't suggesting that. But the issue is how do we balance these two conflicting goals, both important, and that is what the hearing is about today. So, I am going to go into a little more detail.

As the title of our hearing states, we are examining the impacts of NOAA's proposed changes to the current North Atlantic right whale Vessel Strike Reduction Rule, often called the Speed Restriction Rule. The North Atlantic right whales were once hunted nearly to extinction by commercial whalers. And while whaling is no longer a threat, right whales continue to be one of

the most endangered whale species in the world, with less than 350 whales left.

Vessel strikes and commercial fishing gear entanglements are considered the leading cause of whale mortalities and injuries. Understandably, these whales require protection. Currently, vessels over 65 feet in length cannot go faster than 10 knots when going through seasonal management areas. These areas were selected because they are areas known to be inhabited by right whales.

Last summer, NOAA published proposed changes to this rule, which significantly expands the type of vessels that are required to comply with speed restrictions, and more than doubles the existing area in which speed restrictions apply. Under the proposed changes, all vessels 35 feet long or longer cannot travel faster than 10 knots within seasonal geographic areas that extend from Massachusetts to central Florida. That is almost the entire East Coast of the United States.

As we will hear today, there is frustration and concern over the rationale NOAA used in deciding to issue the proposed changes to its rule to include vessels under 65 feet in length.

I will be the first to admit I am not a boat person. I come from a very, very dry desert region. But even I have a hard time understanding how a 35-foot boat has a 32-foot draft. Yet, as several of our witnesses will discuss today, these are some of the assumptions made in NOAA's analysis.

More concerning, however, are the proposed changes to the existing navigation safety "deviation clause." Without an adequate safety deviation clause, men and women will be unnecessarily put in dangerous situations that can threaten the navigational safety of the Federal navigational channels.

Our witnesses here today have decades of experience on the water, and will be able to explain the impacts those changes will have on the fishing community and the commercial shipping industry. The issue is not should these whales be protected, but rather are NOAA's proposed changes rooted in science and in practical application, not to mention do these changes take into consideration the impacts of the safety of boaters throughout the Eastern Seaboard?

Are there better alternatives than essentially shutting down ocean commercial activity along the entire East Coast to commerce to protect the species? I sure hope so.

I look forward to hearing from our Members and witnesses before us today. And with that, I will now introduce our witnesses: The Honorable Janet Coit, Deputy Administrator for the National Oceanic and Atmospheric Administration in Washington, DC; Mr. Frank Hugelmeyer, President and CEO of National Marine Manufacturers Association in Washington, DC; Mr. Clayton Diamond, Executive Director of the American Pilots Association in Washington, DC; Dr. Jessica Redfern, Associate Vice President of Ocean Conservation Science, Anderson Cabot Center for Ocean Science at the New England Aquarium in Boston, Massachusetts; and Mr. Fred Gamboa, Captain of Andreas' Toy Charters in Princeton, New Jersey.

Let me remind the witnesses that under Committee Rules, you must limit your oral statements to 5 minutes, but your entire statement will appear in the hearing record.

To begin your testimony, please press the talk button on the microphone.

We use timing lights. When you begin, the light will turn green. When you have 1 minute remaining, the light will turn yellow. And at the end of 5 minutes, the light will turn red. I will ask each of you to please complete your statement. In fact, I will start tapping on this microphone, and eventually drown you out. So, please stop when I mention your time is up.

I will also allow all witnesses to testify before Member questioning.

I now recognize Deputy Administrator Coit for 5 minutes.

STATEMENT OF THE HON. JANET COIT, DEPUTY ADMINISTRATOR FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, WASHINGTON, DC

Ms. COIT. Good morning, Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee. Thank you for the opportunity to testify before you on the proposed rule to amend the existing North Atlantic Right Whale Vessel Strike Reduction Rule.

Endangered North Atlantic right whales are approaching extinction, with fewer than 350 whales remaining. Vessel strikes and entanglements are driving the population's decline. Urgent action is needed to address these threats and to prevent extinction. In fact, the potential biological removal that this population can sustain is less than one whale death per year. We cannot afford to cause even one mortal take per year of a North Atlantic right whale and achieve our recovery goals.

As we near the 50th anniversary of the Endangered Species Act, one of our nation's strongest environmental laws, it is noteworthy that, since the law was enacted, no listed marine or anadromous species have gone extinct, and some species have recovered. Species like the North Pacific population of gray whales and the distinct population segment of humpback whales that occur in the waters off of the U.S. Atlantic Coast. In other words, the Endangered Species Act is an effective law. It is a law that recognizes the value of biodiversity, and it directs Federal agencies to seek to conserve endangered and threatened species.

Addressing the threat of vessel strikes to North Atlantic right whales is a critical next step to recover these endangered whales based on the statutory requirements under both the Endangered Species Act and the Marine Mammal Protection Act. To protect North Atlantic right whales, most vessels 65 feet or longer have been subject to seasonal 10-knot vessel speed restrictions outside every major port between Boston and Jacksonville, and along certain other portions of the Atlantic Coast since 2008. And for the past 15 years within this Atlantic region, nearly every large oceangoing vessel must pass through seasonal speed-restricted areas to access major ports. During this same period, oceangoing trade on the East Coast has thrived.

Unfortunately, following a period of population growth between 1990 and 2010, right whales have been declining over the past decade.

In January 2021, NOAA Fisheries released and invited public comment on an assessment of the 2008 Right Whale Vessel Speed Rule, which highlighted the need to address several areas of the existing rule. Last summer, informed by public comments received on that 2021 assessment, NOAA Fisheries published proposed changes to the existing vessel speed regulations to further reduce the risk to North Atlantic right whales. These proposed changes would broaden the spatial boundaries and duration of the current seasonal speed restriction areas, expand the mandatory speed restrictions to include most vessels between 35 and 65 feet in length, and also include a mandatory dynamic speed zone program. The proposed rule also updates and expands the rule's safety provisions.

The public comment period for the proposed rule closed on October 31, 2022. NOAA received over 90,000 comments, and we will use these to inform our final action.

It is important to emphasize that this is a proposal. At this stage, I cannot speak to the final rule. We anticipate taking final action later this year, based on the input we received. We appreciate your interest in the proposed changes to the vessel speed regulations and in NOAA Fisheries' efforts to prevent the extinction of this critically endangered species while maintaining port operations and ensuring safety.

Finally, the current and proposed vessel speed restrictions are part of a larger strategy, known as the North Atlantic Right Whale Road to Recovery, which describes all of NOAA Fisheries' efforts to recover this endangered species. In support of that strategy, I am pleased to announce that earlier today, NOAA and the Department of Commerce put forth our spend plan under the Inflation Reduction Act. NOAA's spend plan includes significant funding to support the application, development, and evaluation of monitoring technologies like expanding use of plastic acoustics and using satellite data to transform North Atlantic right whale monitoring.

In addition, we will devote new funds to working with industry, partners, and other Federal agencies to develop and improve vessel detection and avoidance technologies that can further reduce risk to whales.

We all want to see North Atlantic right whales recover and thrive. We value the opportunity to continue working with this Subcommittee on these important issues.

Thank you, members of the Subcommittee and your staff, for your work to support NOAA's mission. And I am happy to take your questions after the other witnesses. Thank you.

[The prepared statement of Ms. Coit follows:]

PREPARED STATEMENT OF NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee, thank you for the opportunity to testify before you today. The National Oceanic and Atmospheric Administration (NOAA) is responsible for the stewardship of the nation's living marine resources and their habitat. NOAA Fisheries provides vital services for the nation: sustainable and productive fisheries, safe sources of seafood, the recovery and conservation of protected species, and healthy ecosystems—all backed by sound science and an ecosystem-based approach to management. NOAA Fisheries' work is intrinsically connected to the mission of the Department of Commerce—to create conditions for economic growth and opportunity for all communities. The resilience and economic vitality of our marine ecosystems, and coastal communities depends on healthy marine species, including protected species such as whales, sea turtles, salmon, and corals.

Endangered North Atlantic right whales are approaching extinction with fewer than 350 individuals and fewer than 70 reproductively active females remaining. While climate-related impacts and prey availability have contributed to the population's poor health, vessel strikes and entanglements are driving the population's decline and are the primary cause of serious injuries and mortalities. North Atlantic right whales are especially vulnerable to vessel strikes due to their coastal distribution and frequent occurrence at near-surface depths. This is particularly true for females with calves. In fact, given the current population level, the "potential biological removal" that can be sustained is less than one whale death per year. That is, we cannot afford to cause even one mortal "take" per year of a North Atlantic right whale and achieve our recovery goals.

Since 2008, most vessels 65 ft or longer have been subject to seasonal 10-knot vessel speed restrictions outside every major port between Boston and Jacksonville, and along certain portions of the Atlantic coast. Within this region, nearly every large ocean-going vessel must pass through seasonal speed restricted areas to access major ports. The US Coast Guard has no reports of vessel groundings or other accidents due to the speed restriction. During this period, ocean-going trade on the East Coast has thrived. For example, the Ports of New York/New Jersey were recently declared the busiest ports in the United States, and cargo throughput at the Port of Savannah has continued to grow year after year.

In January 2021, NOAA Fisheries released and invited public comment on an assessment [1] of the 2008 right whale vessel speed rule, which highlighted the need to address seasonal speed restriction area boundary and timing changes, strike risk from vessels less than 65 ft in length, updates to the safety deviation provision, and poor cooperation with the voluntary Dynamic Management Area program.

In July 2022, NOAA Fisheries announced proposed changes to the existing vessel speed regulations, which were informed by public comments received on the 2021 speed rule assessment, to further reduce the likelihood of North Atlantic right whale deaths and serious injuries resulting from collisions with vessels. The proposed changes would broaden the spatial boundaries and duration of the current seasonal speed restriction areas along the East Coast. They would also expand the applicability of the mandatory speed restrictions to include most vessels 35–65 feet in length.

These proposed changes to the current speed rule would address two key problems affecting right whale recovery: (1) misalignment between areas and periods of high vessel strike risk and the spatial and temporal bounds of the current seasonal speed restriction areas; and (2) lack of mandatory speed restriction on vessels less than 65 feet in length, which have been documented to be a lethal threat to right whales. Additional proposed changes to the speed rule include the creation of a mandatory Dynamic Speed Zone program establishing temporary 10-knot transit zones when right whales are present and predicted to persist in areas when no seasonal speed zone is in effect; and updates to the rule's safety provisions, allowing vessels to exceed the 10-knot restriction in certain circumstances.

We appreciate your interest in the proposed changes to the vessel speed regulations and NOAA Fisheries' efforts to prevent the extinction of this critically endangered species while maintaining port operations and ensuring safety. The public comment period for the proposed rule closed on October 31, 2022. NOAA received over 90,000 comments and will use them to inform its final action on the proposed rule, which it anticipates announcing in 2023.

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[1] https://www.fisheries.noaa.gov/s3/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf

The North Atlantic Right Whale "Road to Recovery" is a strategy that describes all of NOAA Fisheries' efforts to halt the current population decline and recover this endangered species. It is built on the foundation of the statutory requirements that we are charged with implementing under the Endangered Species Act and the Marine Mammal Protection Act. It shows how our collective actions, in collaboration with partners, fit together to save this iconic species. To prevent the extinction of this species and to enable them to recover, urgent action is needed to address existing and emerging threats to the species.

Conclusion

NOAA is proud to continue to lead the world in conducting ocean science, serving the nation's coastal communities and industries, ensuring responsible stewardship of our ocean and coastal resources, and fostering economic growth and opportunity. We value the opportunity to continue working with this Subcommittee on these important issues. Thank you, Members of the Subcommittee and your staff for your work to support NOAA's mission. I am happy to take your questions.

QUESTIONS SUBMITTED FOR THE RECORD TO JANET COIT, ASSISTANT ADMINISTRATOR, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Questions Submitted by Representative Westerman

Question 1. How many North Atlantic right whales have been lethally struck, outside of the current speed zones since 2008, by vessels between 35 to 65 feet in length?

Answer. Vessels between 35 and 65 feet in length are known to have accounted for five of the 14 documented lethal strike events in U.S. waters since the speed rule went into effect in December 2008, demonstrating the significant risk that vessels of this size class present to right whales. (Note: Vessel length was unknown for eight of these lethal events, and likely greater than 65 feet for one of the events.) Four of the five documented collision events known to involve a vessel between 35 and 65 feet in length occurred inside active Seasonal Management Areas, and one was just outside (i.e., less than 100 yards) although all vessels involved were not subject to mandatory speed restrictions due to their size.

Furthermore, since 2009, operators of vessels less than 65 feet in length have reported an additional six vessel collisions (including five serious injuries) with undetermined large whale species in U.S. waters that may have involved right whales based on the location and timing of the events (Henry et al. 2017).

Question 2. Based on Mr. Gamboa's testimony, he indicated if the proposed vessel speed restrictions were to go into effect, he would lose a third of his business, $140,000. That is just one business. Can NOAA verify the number of HMS Permits and federal for-hire permits that have been issued from Florida to Massachusetts?

Answer. Based on 2021 and 2022 data, approximately 1,957 charter/for-hire fishing vessels, 1,194 commercial vessels, and 3,430 recreational vessels (6,581 vessels total) had a NMFS Atlantic Highly Migratory Species (HMS) permit or other offshore permit issued by the Greater Atlantic Regional Fisheries Office (GARFO) or Southeast Regional Office (SERO), and are potentially impacted by the proposed rule. This estimate only includes vessels between 35 and 65 feet in length and a hailing port or principal port in the area from southern Maine (York, Maine) to South-Central Florida (Port St. Lucie area). This is not the total number of permits issued in this area, but rather the number of unique vessels, since many vessels have a combination of permit types and uses. For example, a vessel may hold HMS, GARFO and SERO-issued permits, but that vessel would only be counted once. Additionally, one vessel may have a permit for charter/for-hire and recreational use, and in that case it was counted as a charter/for-hire vessel instead of recreational. Also, vessels greater than 65 ft in length, which are already subject to speed restrictions, may carry a variety of commercial and recreational fishing permits.

Estimated Number of Impacted Vessels 35–65 ft in Length with NMFS HMS or Offshore Fishing Permits

Vessel	Estimated Number
For-Hire/Charter	1,957
Commercial	1,194
Recreational	3,430
Total	**6,581**

Question 3. This proposed rule greatly expands static seasonal management areas, for speed restrictions. However, NOAA already has a process to identify and put in place dynamic management zones, or DMA's. These zones are supposed to be responsive to sightings or known locations. For these DMA's, how does NOAA identify the location of the North Atlantic Right Whale and promptly communicate that information to the boating and mariner community? Can you provide details about the typical timeline from identifying a known or potential location of the Right Whales to the dissemination of this information to end users on the water? Furthermore, does NOAA collaborate with any third-party organizations to gather crowd-sourced whale sightings and publish them for use to make navigation decisions while under way by the broader mariner community, and was evaluating or improving those collaborations part of the rulemaking process?

Answer. NMFS implemented a voluntary Dynamic Management Area program concurrently with the mandatory speed rule in 2008. Under current protocols, a Dynamic Management Area is triggered when a group of three or more right whales are sighted in close proximity. Confirmed right whale sightings usually come from formal scientific surveys but can also be reported by members of the public, other government entities (e.g., U.S. Coast Guard (USCG)), or mariners. NOAA offers options, including the Whale Alert app. to report both live and stranded/injured marine mammals and sometimes local research organizations/aquariums also alert NMFS to reports from the public. Since 2020, NMFS' Dynamic Management Area program has also included acoustically triggered Slow Zones. Once the sightings or acoustic detection trigger is met, NMFS establishes a boundary around the whales (usually within 24–36 hours) for 15 days and urges vessels to either avoid the area or transit through at speeds less than 10 knots. Dynamic Management Areas/Slow Zones may be extended if whales remain in the area. NMFS alerts mariners to Dynamic Management Area and Slow Zone declarations through website postings, emails to lists of interested parties, USCG Local Notices to Mariners, and USCG Broadcast Notices to Mariners.

Vessel operators or interested parties can sign up for email or text notifications about the latest Right Whale Slow Zones, or visit Facebook (@NOAAFisheriesNEMA) and Twitter (@NOAAFish_GARFO) for announcements. Vessel operators or interested parties can also check for Dynamic Management Areas/Slow Zones on our online right whale sightings map or on the free Whale Alert app, which will automatically notify vessel operators entering one of these areas.

The effectiveness of the voluntary Dynamic Management Area program was evaluated as part of the NMFS 2020 Vessel Speed Rule Assessment. We found that mariner cooperation with voluntary speed recommendations in Dynamic Management Areas is generally low, and as such likely does not provide a meaningful reduction in vessel strike risk. The 2008 speed rule stated that the agency would "monitor voluntary compliance" and if cooperation was not satisfactory would "consider making them mandatory, through a subsequent rulemaking" (73 FR 60173, October 10, 2008). The proposed vessel speed rule modifications would replace this voluntary program with a mandatory Dynamic Speed Zone program that would improve on the existing Dynamic Management Area program.

Question 4. Marine Cartography and Marine technology for smaller vessels have advanced substantially since the existing vessel speed restrictions were put in place in 2008. Chart plotters capable of updateable cartography are commonplace across the recreational boating industry now, meaning maps and charts can be updated on a near daily basis for boats of all classes and sizes. During the drafting process of the proposed rule, did NOAA actively engage in discussions with manufacturers of marine vessels and marine electronics to explore and obtain information about existing technologies that could significantly enhance its capacity to identify known

or potential whale locations in real-time or near real time, and effectively disseminate that information to a wide audience? Furthermore, did NOAA assess ways to enhance its current practices and timelines for identifying known whale locations and promptly sharing that information?

Answer. NMFS is aware of the wide variety of navigation systems used on different vessel types. The systems employed on different vessels use a diversity of chart products, and depending on capabilities, and the age of the system, have a range of capacities for updating information. In developing the proposed rule, NMFS focused on measures that would have the greatest and most immediate impact on reducing lethal strike events along the U.S. coast given the urgent need to minimize risk to the species and prevent its extinction. The current Dynamic Management Area/Slow Zone program serves as a de facto warning to mariners about the presence of right whales. However, given the low level of mariner cooperation with voluntary slow downs, the Agency proposed to ensure any future dynamic management program would provide meaningful protection to North Atlantic right whales, including improvements in communication with mariners. In the proposed rule (87 FR 46921; June 29, 2022), we specifically solicited input from mariners about how best to communicate information, including about the designation of dynamic zones. During the public comment period, we received over 90,000 comments and are considering them as we work toward final action. We believe that providing data on vessel speed restrictions, voluntary measures, and whale locations directly to vessel navigational systems (where possible given vessel equipment/systems) will be an effective and efficient addition to our communication efforts.

We are working to identify technologies that could be used or modified to both detect and avoid whales, as well as emerging technologies possibly capable of detecting whales, and/or enhancing vessel avoidance capabilities to reduce strikes. To accelerate this work, we are dedicating $82 million in Inflation Reduction Act (IRA) funding over the next four years for North Atlantic right whale conservation, $20 million of which is specifically to reduce vessel strike risk by developing, testing and ultimately, implementing effective detection and avoidance technology.

Currently, we conduct aerial surveys and passive acoustic monitoring along the U.S. East Coast and communicate right whale detections to mariners through a variety of mechanisms. For example, the Whale Alert app provides mariners and members of the public a user-friendly tool that displays whale sightings and detections. Through the app, users can also report live, dead, or distressed whale sightings to the appropriate response agency. The NMFS-partnered https://whalemap.org/ website provides comprehensive information including historic sightings and acoustic detections.

Questions Submitted by Representative Kiggans

Question 1. At a time of inflation and increasing financial pressure on families, this proposal will increase costs of shipping goods and conducting fishing activities, thus increasing costs to consumers for a variety of goods including sustainable seafood. In addition, this rule will increase the costs to construct, operate, and maintain offshore energy projects, thus increasing the costs of electricity to ratepayers.

1a) Has NOAA conducted a cost benefit analysis of this rule and if so, what were the results of that analysis?

Answer. In July 2022, NMFS published the Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis for its proposed "Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule." This draft report evaluated the costs and benefits of the proposed amendments to the current speed rule to better protect North Atlantic right whales from lethal collisions with vessels in U.S. waters.

The benefits of North Atlantic right whale and other endangered whale protections include tourism benefits accruing from activities such as commercial whale watching operations. A study by Hoyt (2001) suggests that roughly half of all commercial whale watching worldwide occurs in the United States, largely centered in New England. Large whales also provide ecosystem services, including playing an important role in carbon cycling in the oceans, and contribute to sense of place, education, and research. Finally, slowing vessel speeds is expected to provide ancillary benefits for mariner safety, ocean noise reduction, and the lowering of polluting emissions.

The draft report estimated the direct costs to vessel operators from the proposed changes to the speed rule. We estimated that approximately 15,899 vessels would be potentially affected along the U.S. Atlantic coast from Maine to Florida, resulting

in up to 121,061 additional transit hours annually across all vessel types, size classes, and regions. The total estimated annual costs associated with the proposed rule are $46,216,122. Over 86% of the costs are expected to be incurred by vessels operating in the Northeast and Mid-Atlantic regions (ME to NC) largely due to the greater proposed expansion of seasonal speed restrictions in those areas and the higher amount of commercial traffic overall. The cost estimates provided in the draft report were based on operating and fuel cost estimates from 2021, and these estimates can vary year to year. Additionally, it is important to recognize that not all vessels that would be subject to speed restriction would actually be impacted, or heavily impacted, by the proposed changes. For example, many vessels already transit below 10 knots, or close to 10 knots, as part of their regular operations. These include certain industrial vessels, commercial fishing vessels, sailing vessels, and others. Finally, the draft economic report does not address future activities, such as offshore wind development, because at the time the draft report was written, there was a high degree of uncertainty about the future location, timing and nature (i.e., vessel types, speeds, etc.) of associated vessel activity.

Question 2. Environmental regulation is at its best when it harnesses human ingenuity to come up with innovative solutions-the Clean Water Act and Clean Air Act have succeeded using this model: setting performance-based targets and creating the space for new technologies to meet those targets. We know that there are a range of promising technologies out there that could monitor and detect whales in real time and thereby reduce the risk of vessel strikes.

2a) How does the vessel speed rule, with its one-size-fits-all across-the-board speed restriction, incentivize the development and implementation of new whale detection and monitoring technologies?

2b) What changes can be made to the proposed vessel strike rule that can further encourage and incentivize the development and implementation of this technology?

Answer. Changes to the speed regulations are proposed to reduce vessel strike risk based on a coast wide collision mortality risk assessment and updated information on right whale distribution, vessel traffic patterns, and vessel strike mortality and serious injury events. These changes are essential to stabilize the ongoing right whale population decline and prevent the species' extinction. That said, we remain open to incorporating additional tools in the future and are working to identify technologies that could be developed or modified to detect and avoid whales to reduce strikes. To accelerate this work, we are dedicating $82 million of Inflation Reduction Act (IRA) funding over the next four years for right whale conservation, $20 million of which is to reduce vessel strike risk by developing, testing and ultimately, implementing effective detection and avoidance technology.

Detecting whale presence is essential but only part of the equation for reducing the risk of lethal vessel strikes. Since 2008, NMFS has declared voluntary Dynamic Management Areas/Slow Zones where whales are recently detected only to have low cooperation from mariners in slowing down. The agency seeks to harness technologies that will help better monitor whales but also work with vessel operators to maximize the value of that information to reduce strike events.

Question 3. In the conlext of offshore wind surveys, construction, operations, and maintenance, slower vessel speeds will result in more on-water time and more overall trips conducted by multiple vessels to complete the same tasks compared to vessels operating at higher speeds.

3a) How do more trips, more vessels, and more overall vessel time on the water impact the overall collision risk to North Atlantic Right Whales?

Answer. North Atlantic right whale vessel speed restrictions reduce the likelihood of lethal collisions between vessels and whales. It is challenging to predict how different mariner groups might respond, adjust, or otherwise modify operations to accommodate measures in the proposed rule. This is especially true for future offshore wind development. Given that we lack robust predictions of coast-wide vessel activity for offshore wind surveys, construction, operations, and maintenance, we cannot quantitatively assess the potential impact of the proposed rule on these activities.

The proposed changes to the speed rule will impact a wide variety of vessel types and operators, and we anticipate decisions regarding changes to vessel operations will vary depending on the unique nature of a vessel's operations, needs, schedule, flexibility, and cost. We are carefully considering the public input received on our draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis prepared for the proposed "Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule" as we work toward developing a final action on the proposed rule.

Irrespective of any existing or proposed speed regulations, federally permitted or funded activities that may affect an ESA-listed species (such as offshore wind development projects) must be conducted in a manner that is not likely to jeopardize the continued existence of such species. As such, federal permitting agencies often require measures such as speed restrictions to minimize impacts on listed species. In addition, any activity that is likely to result in take of marine mammals as defined under the Marine Mammal Protection Act (MMPA) is advised to obtain an MMPA incidental take authorization so that any take is lawful. Such an authorization also requires NMFS to prescribe mitigation measures that provide the "means of effecting the least practicable adverse impact" on the affected species, which often includes speed restrictions.

3b) Has NOAA calculated how many additional vessel trips and how much additional time on water would result from the implementation of this rule?

Answer. In July 2022, NMFS published its Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis for its proposed "Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule." The assessment estimated delayed (or additional) transit hours that would likely accrue to each vessel type in each region as a result of a 10-knot speed restriction within relevant speed restriction areas and seasons. We estimate 15,899 vessels would potentially be affected along the U.S. Atlantic coast from Maine to Florida, resulting in up to 121,061 additional transit hours annually across all vessel types, size classes, and regions. This analysis evaluated the economic impacts of 10-knot mandatory speed limits for vessels that normally would transit at speeds greater than 10 knots in active or newly proposed speed restriction zones. Additionally, it is important to recognize that not all vessels that would be subject to speed restriction would actually be impacted, or heavily impacted, by the proposed changes. For example, many vessels already transit below 10 knots, or close to 10 knots, as part of their regular operations. These include certain industrial vessels, commercial fishing vessels, sailing vessels, and others. As noted above, in our assessment we were not able to quantify impacts to future vessel operations associated with offshore wind development.

3c) Has NOAA accounted for increased human safety risk from additional time on the water?

Answer. We considered mariner safety during all aspects of the proposed rule development, and continue to consider input received during the public comment period for any final action. In addition to the existing deviation exception in the current regulation for navigational safety, the proposed rule would newly allow vessels to exceed the 10-knot speed limit during emergency situations when the health, safety, or life of a person is at risk; vessels would have to submit a safety deviation report if a speed deviation occurs. Vessels less than 65 ft in length also would be allowed to transit at speeds greater than 10 knots within areas with a National Weather Service Gale Warning, or other National Weather Service Warnings greater than gale force winds (e.g., Storm Warning, Hurricane Warning) without submitting a safety deviation report. NMFS expects all mariners, as part of prudent offshore wind vessel operations, to monitor weather and ocean conditions prior to setting out and be mindful of how a 10-knot speed restriction may impact their operations, including vessel staffing needs.

Question 4. If implemented, these vessel speed restrictions may require offshore hoteling of operations and maintenance crews for offshore wind energy projects, especially as projects begin to be developed further from shore. How has NOAA accounted for the socioeconomic impact of crews being away from family for extended periods of time?

Answer. As future operations, the socioeconomic impacts from potentially hoteling crews for offshore wind energy development were outside of the scope of NMFS' economic assessment for this rule.

Questions Submitted by Representative Buddy Carter

Safety of Life (Pilots, Pilot Boat Crews, and Mariners in General)

Question 1. Prior to publishing its proposed amendments to the North Atlantic Right Whale (NARW) vessel strike reduction rule in August 2022, did NOAA conduct any outreach as it relates to the impacts the proposed amendments to the NARW rule will have on maritime pilots and pilot-boat crews?

Answer. In January 2021, NMFS released the North Atlantic Right Whale Vessel Speed Rule Assessment which evaluated several aspects of the existing right whale speed rule and associated voluntary Dynamic Management Area program including

mariner compliance/cooperation, biological efficacy and safety considerations. The report also included recommendations for potential changes to the current speed rule. NMFS solicited public comment on the report through March 2021 and received 34 unique comments (representing over 21,000 individuals) from stakeholders and members of the public, including comments from the American Pilots Association, Brunswick Bar Pilots Association, Brunswick Pilot Boat Corp, the Savannah Pilots Association, Florida Harbor Pilots Association, Quoddy Pilots, Charleston Pilots Association, Delaware Bay Launch, and the Cape Fear Pilots Association.

Question 2. If the answer to the above question is yes, please provide the details of that outreach to include the dates of the out-reach and the parties that NOAA talked, met, or consulted with as well as any pertinent information pertaining to the anticipated impacts that the proposed rule would have on maritime pilots and pilot-boat crews.

Answer. In addition to the published speed rule assessment report and solicitation of public comment (described in the previous response), NMFS staff had additional meetings with relevant stakeholders regarding the assessment report and pilot operations including the following:

- On February 5, 2021, NMFS staff met with Hope Moorer representing the Georgia Ports Authority.
- On April 22, 2021, NMFS staff met with Clay Diamond and Jorge Viso representing the American Pilots Association.
- On June 10, 2021, NMFS staff met with Trey Thompson representing the Savannah Bar Pilots Association and members of Sen. Ossoff and Sen. Warnock's staff.

During these meetings, NMFS staff generally listened to input and comments from these stakeholders.

Question 3. Prior to publishing the proposed amendments to the NARW vessel strike reduction rule in August 2022, did NOAA consider the operational impacts to pilot boats, including the speed at which various pilot boats must obtain before they are on plane, the impacts of boat operator visibility and pilot boat stability when a pilot boat is not operating on plane?

Answer. NMFS considered impacts to pilot boat operations from the proposed regulations and met with pilot boat stakeholder groups prior to release of the proposed rule (as described above). NMFS also considered comments received in response to the North Atlantic Right Whale Vessel Speed Rule Assessment as described above. None of the written comments received on the assessment report from the pilots associations specifically discussed pilot vessel operations on plane.

Question 4. If the answer to the above question is yes, please provide the pertinent information pertaining to the anticipated impacts that the proposed rule would have on pilot boat operations.

Answer. The current speed rule already applies to pilot boats greater than 65 ft in length within active Seasonal Management Areas. We estimated that the changes to the proposed rule would impact an additional 26 pilot vessels, with pilot boats less than 35 ft in length remaining unaffected. Overall, we estimated that pilot vessels likely impacted by the proposed rule would incur 2927 delayed transit hours each year. Under the proposed rule, should a pilot boat encounter oceanographic, hydrographic, and/or meteorological conditions severely restricting the maneuverability of the vessel, that pilot boat may exceed the 10-knot speed limit if necessary to maintain safe maneuvering speed. Additionally, any pilot vessel less than 65 ft in length may transit at speeds greater than 10 knots (5.1 m/s) 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.

Question 5. I understand and appreciate that NOAA took the time to discuss pilot safety and other concerns with the American Pilots' Association (APA) in September 2022. Since APA submitted its comments to NOAA in October 2022, has NOAA had any further discussion with the APA or consultation with other parties pertaining to the pilot safety concerns raised in APA comments to the proposed rulemaking and Questions 1 and 3 above?

Answer. Yes.

Question 6. If the answer to the above question is yes, please provide the details of that outreach to include the dates of the out-reach and the parties that NOAA

talked, met, or consulted with as well as any pertinent information pertaining to the anticipated impacts that the proposed rule would have on maritime pilots, pilot-boat crews, and pilot boat operations.

Answer. NMFS staff met with Clay Diamond representing the APA again on June 29, 2023, to gain clarification on certain elements (including safety matters) of their comments provided during the proposed rule comment period. Mr. Diamond reiterated certain aspects of the APA comments. Outreach and communication related matters of relevance to the current and proposed speed rule were also discussed at the meeting.

Question 7. If the answer to the above question is no, will NOAA discuss these serious safety concerns with APA and provide any planned updates to the proposed rule for review before publishing a final rule?

Answer. N/A

Question 8. Prior to publishing its proposed amendments to the NARW vessel strike reduction in August 2022, did NOAA conduct any outreach as it relates to the impacts the proposed amendments to the NARW rule will have on the safety of mariners operating under the new speed restrictions?

Answer. Please see response to Question #1.

Question 9. If the answer to the above question is yes, please provide the details of that outreach to include the dates of the out-reach and the parties that NOAA talked, met, or consulted with as well as any pertinent information pertaining to the safety of mariners operating under the new speed restrictions.

Answer. As discussed above, in January 2021, NMFS released the North Atlantic Right Whale Vessel Speed Rule Assessment and solicited comments on the report. The agency received 34 unique comments (representing over 21,000 individuals) from stakeholders and members of the public, including comments from industry, pilot associations, ports, environmental NGOs, fishing interests, government and the public. Some of these comments, which are posted publicly on the NMFS website. included input regarding mariner and navigational safety issues.

Question 10. Since APA submitted its comments to NOAA in October 2022, has NOAA had any further discussion with or consultation with other parties pertaining to the safety of mariners operating under the new speed restrictions?

Answer. Yes, since the APA submitted comments on 10/28/22, NMFS staff had additional discussions with external groups regarding mariner safety.

Question 11. If the answer to the above question is yes, please provide the details of that outreach to include the dates of the out-reach and the parties that NOAA talked, met, or consulted with as well as any pertinent information pertaining to the safety of mariners operating under the new speed restrictions.

Answer. NMFS staff met with members of Senator Whitehouse's staff on Oct 31, 2022, regarding sailing races and the proposed speed regulations, and on Jan 18, 2022, NMFS staff met with the USCG National Boating Safety Advisory Committee. Safety issues discussed included vessel passenger safety should a whale strike occur and general impacts to vessel operations and potential safety issues.

Navigation Safety of Large Vessels in Narrow Restricted Channels

Question 1. Prior to publishing its proposed amendments to the NARW vessel strike reduction rule, did NOAA conduct any outreach as it relates to the impacts of the rule on the safe navigation of large vessels operating in the Federal Navigation Channels (FNC)? Specifically, did NOAA talk to the U.S. Coast Guard or the Army Corps of Engineers on the potential impacts to navigational safety to large vessels in FNCs?

Answer. As noted above (in the response to Question #9), NMFS solicited public comment on its North Atlantic Right Whale Vessel Speed Rule Assessment. Neither USCG nor U.S. Army Corps of Engineers (USACE) provided comment on the Assessment. Both the USCG and USACE had an opportunity to review the proposed rule prior to publication as part of the Office of Information and Regulatory Affairs (OIRA) interagency review process under E.0. 12866. NMFS staff work regularly in partnership with USCG on outreach and enforcement of the current right whale speed rule. We are carefully considering the input received from other Federal agencies as we work toward developing a final action on the proposed rule. Federal agencies will be provided with an opportunity to review any final rule via the OIRA review process.

Question 2. If the answer to the above question is yes, please provide the details of that outreach to include the dates of the out-reach and the parties that NOAA talked, met, or consulted with as well as any pertinent information pertaining to the anticipated impacts that the proposed rule would have the navigational safety of large vessels in FNCs.

Answer. In early 2021, NMFS conducted outreach on the speed rule in the form of comment solicitation on the North Atlantic Right Whale Vessel Speed Rule Assessment. (Those comments are publicly available at the same website.) NMFS had no specific meeting with external stakeholders focused on the safe navigation of large vessels in FNCs prior to publication of the proposed rule but did meet with stakeholders on related topics (as described earlier). NMFS coordinates regularly with USCG regarding implementation and enforcement of the right whale speed rule (and other right whale protection efforts), but these interactions are too numerous to detail here. NMFS has not met specifically with USCG or USACE, nor has either agency raised concerns to NMFS, regarding navigational safety of large vessels in FNCs, except that USCG has confirmed to NMFS that that they have not had any reports of a vessel reporting a casualty event which cited the NARW speed regulations as a contributing factor.

Questionable Support for Proposed Regulations

Question 1. What is the current NOAA estimation of the NARW population? Please provide details on what NOAA considers to be the total NARW population.

Answer. As published in the 2022 stock assessment report for North Atlantic right whales, NMFS' best estimate of the population is 338 individuals (95% Credible Intervals: 325–350). This represents the population as of November 2020 due to the time necessary to process and analyze data.

Question 2. Does NOAA count NARW calves in the total NARW population?

Answer. NMFS does not consider calves part of the population for a marine mammal stock assessment. Calves (whales less than 1 year of age) are not counted as part of the population for a year. The population model using sightings data is only relevant to subadults and adults because an individual whale needs to be >6 months old to enter the sightings catalog as a uniquely identifiable individual. For the purposes of stock assessment and population monitoring, calves are small and vulnerable to some threats that are not relevant to adults. However, every year, NMFS and our partners closely monitor the calving grounds in the southeastern U.S., identifying and counting every unique mother-calf pair. It is very rare for a new calf to not be documented as part of these annual surveys. These efforts are crucial for understanding individual and temporal variation in reproduction, even though calves are not technically tallied as recruits to the population during assessments.

Question 3. Please provide the total NARW population for every five years from current time through when NOAA first tracked such statistics. For example, what was the NARW population in 2018, 2013, 2008, 2003, etc . . .?

Answer. Under Section 117 of the MMPA, NMFS has published a revised North Atlantic right whale stock assessment report every year since 1997. Under the ESA, NMFS completes a North Atlantic right whale status review every five years, with the most recent review completed in November 2022. Based on current methods and the most up-to-date data, the total NARW population during the requested time period is below:

Year	Estimated Population
2022	338
2017	436
2012	478
2007	414
2002	347
1997	317

Failure to Consider Economic Impact as Required by Law

Question 1. Has NOAA updated its estimated economic impact of the proposed NARW vessel strike reduction rule?

Answer. In July 2022, NMFS published an economic assessment entitled "Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis" for the proposed rule for public comment. We are carefully considering the input received as we work toward developing a final action on the proposed rule, which will include an updated economic assessment.

Question 2. If the answer to the above question is yes, please provide the details of that updated economic impact, including the impact on maritime commerce on the East Coast.

Answer. Any final rule will be accompanied by an updated economic assessment.

Question 3. If NOAA has not updated its estimated economic impact, given that we just heard NOAA's estimated economic impacts might have failed to consider over $8 Billion in impact, will NOAA update this estimate before moving forward with a final rule?

Answer. Any final rule will be accompanied by an updated economic assessment.

Question 4. NOAA held a webinar on August 24, 2022 to discuss the proposed NARW rulemaking. During this webinar, NOAA Economist, Chao Zou-Garfo, acknowledged that, regarding the NARW rulemaking, economic data was not considered and/or needed for small boats (6:57 pm EST), communities served by high-speed ferries (6:59 pm EST), off-shore fishing (7:21 pm EST), and ports (7:25 pm EST). The recording for NOAA's August 16, 2022 webinar is available at the NOAA Fisheries, Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule website at https://www.fisheries.noaa.gov/action/amendments-north-atlanticright-whale-vessel-strike-reduction-rule. NOAA has not yet published the recording of the August 24, 2022 webinar. Why is this recording not yet published? When does NOAA plan on publishing the recording from its August 24, 2022 webinar?

Answer. NMFS presented three webinars on the proposed vessel speed rule, on August 10, 2022; August 16, 2022; and August 24, 2022. All webinars used the same presentation and materials. We recorded the August 16 webinar presentation and posted it on our website: https://videos.fisheries.noaa.gov/detail/video/6311444099112/amendments-to-the-north-atlantic-right-whale-vessel-strike-reduction-rule-informational-webinar?autoStart=true&page=6&q=whales

NMFS did not publicly post any recordings of the Q&A portions of the webinars and does not have plans to do so. Also, please note, that at the beginning of each webinar, NMFS made it clear that the purpose of the webinar was to provide clarification regarding the proposed rule so there was no confusion about what was being proposed. The webinar was not a formal hearing, and the agency was not taking verbal input as formally submitted comments.

Every vessel type and size potentially impacted under the proposed rule was fully considered in the draft economic assessment (including costs associated with delayed transit). (Please see the Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis.) Any statements by agency staff made during the webinar that may have suggested otherwise were potentially erroneous, taken out of context, or misunderstood.

Questions Submitted by Representative Nancy Mace

Safety of Life (Pilots, Pilot Boat Crews, and Mariners in General)

Question 1. Are you aware of studies done by the Army Corps of Engineers which show 10 knot speeds in channels can reduce safety margins by 40–50% compared to 15 and 20 knots?

Answer. NMFS is uncertain about which study Rep. Mace is referring to and as such, cannot comment further. USACE had an opportunity to review the proposed rule prior to publication as part of the Office of Information and Regulatory Affairs (OIRA) interagency review process under E.O. 12866.

Question 2. Did NOAA take potential safety risks like collisions, grounding, capsizing, and swamping of commercial and recreational vessels into account in developing this rule?

Answer. Vessel safety is a priority for NMFS, and the agency considered many aspects of mariner safety. Recent assessments indicate that reducing the speed of large vessels is associated with a reduction in marine casualty events (Chang and Park 2019), and the NMFS North Atlantic Right Whale Vessel Speed Rule Assessment (NMFS 2020) noted a decline in vessel grounding events within active, existing SMAs following implementation of the 2008 vessel speed rule. Collisions with whales are a serious hazard for vessel operators. There are many cases from the United States and around the world of vessels sustaining significant damage, and even sinking, following collisions with whales (NMFS 2020). For example, in March 2009, a 30-foot pleasure craft collided with a whale off Hilton Head, SC and sustained damage significant enough to require passenger rescue by the USCG. For small and mid-sized vessels, avoiding vessel strikes is a matter of safety for both mariners and whales.

NMFS proposed additions to the current safety deviation provision (relating to safe maneuvering speed) to also allow vessels less than 65 ft in length to exceed the 10-knot speed limit in areas with a National Weather Service Gale Warning, or other National Weather Service Warnings greater than gale force winds (e.g., Storm Warning, Hurricane Warning) without having to submit a safety deviation report. In addition, all vessel sizes would be able to exceed 10 knots during emergency situations when the health, safety, or life of a person is at risk.

Question 3. Just last year, Charleston became the deepest port on the east coast after a $600 Million deepening project. The proposed rulemaking would substantially reduce the impact of this project by making it impossible to safely let two ships pass in the channel. Did NOAA consider economic impact on ports in developing this rule?

Answer. For the past 14+ years, the entrance channel to the port of Charleston has been covered by the current Seasonal Management Area 10-knot speed restriction (Nov 1–Apr 30 each year), with vessels regularly, and safely, transiting the entrance channel under two-way traffic. The USCG has informed NMFS that no mariner casualty events have been reported by vessels in that area citing right whale speed restrictions as a factor. Impacts to large ocean-going ships were included in the draft economic assessment that accompanied the proposed rule.

Question 4. What is the timeline for NOAA to release a final rule of 87 FR 46921, Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule?

Answer. We anticipate taking final action in 2023.

Question 5. What studies has NOAA conducted or researched to assess the safety of navigation of large vessels at slow speeds in dredged channels? Has NOAA considered the work of the Army Corps of Engineers Research and Development Center, studying the deleterious effects of slow speed in Charleston's dredged entrance channel?

Answer. Large ocean-going vessels transit at a variety of speeds within dredged channels outside of speed regulated areas. NMFS 2020 North Atlantic Right Whale Vessel Speed Rule Assessment highlights some of the work NMFS did to review the safety of dredged channels. From the report at page 20–21:

> "In May 2019, USACE released a navigation study detailing vessel simulations conducted to evaluate different widening alternatives proposed as part of the ongoing Charleston Harbor Deepening and Widening Project (USACE, 2019). Part of this assessment examined the Fort Sumter Range, a channel segment often referred to as the "entrance channel" to Charleston harbor. Only one alternative was considered for Fort Sumter Range, which included no widening to the existing 800 ft (1000 ft overall) channel. Simulations were run for this no-widening alternative to examine two-way traffic issues, based on an 800 ft wide channel deepened to 54 ft, and an overall 944 ft wide channel deepened to 49 ft along the sides (Figure 60). The simulations used an exemplar container ship with the following dimensions: length 1,201 ft, beam 160 ft and draft 49.9 ft. This is the maximum size for a Post-Panamax vessel.

Two-way traffic runs (i.e., two ships passing) in the channel were simulated on ebb and flow tides with a 30-knot crosswind under two speed conditions: 1) unrestricted speeds, and 2) speeds restricted to 10 knots in keeping with the vessel speed rule. The conditions were chosen to reflect "credible worst-case scenarios." Pilots conducting the simulations observed a decrease in steerage and an increase in the ship's "effective beam" during the restricted runs. The pilots also experienced groundings on some runs while trying to pass each other in the channel. Two-way traffic was deemed viable at 10 knots but with poorer handling. In contrast, the

pilots reported being able to better control ships at unrestricted speeds (typically 13–14 knots).

These simulations were designed to test the limits of safe navigation, using the largest vessels, under poor weather conditions, with two-way traffic in the channel. Fortunately, the simulated scenario described in the report is rare. During the active SMA period in this region (November 1–April 30), 30-knot winds are an uncommon event. Based on wind data from the National Data Buoy Center (NDBC) between 2016 and 2018, wind speeds of 30 knots or higher never exceeded 3% of wind speed observations at the NDBC offshore buoy #41004 during any month the SMA was active. Of the 18 months of data we reviewed, 13 months had no observations of winds ≥30 knots. Wind speeds of 25 knots or higher were also infrequent and never exceeded 16% of wind speed observations at the offshore buoy during any month the SMA was active. At an inshore station (#FBIS1), closer to the harbor entrance, wind speeds of 30 knots or higher never exceeded 2% of wind speed observations during any active month and wind speed events of 25 knots or higher never exceeded 3% of wind speed observations during any active month."

Mr. BENTZ. Thank you, Deputy Coit.

I now recognize Mr. Hugelmeyer for 5 minutes.

STATEMENT OF FRANK HUGELMEYER, PRESIDENT AND CEO, NATIONAL MARINE MANUFACTURERS ASSOCIATION, WASHINGTON, DC

Mr. HUGELMEYER. Mr. Chairman and members of the Committee, thank you for the opportunity to appear. My name is Frank Hugelmeyer, and I am the President and CEO of National Marine Manufacturers Association.

I speak on behalf of America's $230 billion recreational boating fishing industry, which the Commerce Department's Bureau of Economic Analysis confirms is the top contributor to our nation's $862 billion outdoor recreation economy. We are a made-in-America sector, and a driving force for national, state, local, and coastal economies, supporting 812,000 jobs and 36,000 businesses across the nation.

One of the most concentrated corridors for boating activities and the vital jobs and businesses they support is the Atlantic Seaboard. A core value of our community is protection of our shared natural resources, ocean ecosystems, and marine life. Our community contributes nearly $1 billion in annual conservation funding via the excise tax on boat fuel sales and fishing gear.

We have a long bipartisan track record of successfully working with Congress and the executive branch to develop policies that promote conservation and responsible recreation. So, we were stunned to learn that NOAA, with no prior engagement or discussion with the marine industry, proposed regulations representing the greatest restriction of public access to our nation's cherished waterways in our time.

Under the proposal, all boats over 35 feet cannot travel faster than 10 knots, or about 11 miles per hour, within a vast area extending from Massachusetts to central Florida, essentially requiring Americans to risk their vessel and their own lives in unpredictable seas by going the speed of a bicycle. The speed zones would extend as far out as 90 miles offshore and last for up to 7 months, deterring citizens and businesses from venturing out to sea.

This unprecedented expansion is not supported by the data or NOAA's published facts. One study shows that fatal whale strikes come from boats over 260 feet, and since 2008, there has been one documented U.S. instance of a recreational boat under 65 feet outside of the already-existing speed zones striking a North Atlantic right whale and causing death. One whale death in 15 years does not justify transforming the outdoor recreation economy of 11 states. A question of such deep economic, societal, political significance should only be addressed by Congress.

And make no mistake, NOAA's proposal will have broad economic consequences because the rule lacks serious impact analysis on the marine economy, including harm to charter operations, water sports tours, marinas, tackle shops, boat sales, manufacturing, and more. And there was no impact analysis on tax revenues critical to local, state, or Federal coffers. If allowed to proceed, this proposal will have devastating impacts on thousands of jobs and small businesses supported by boating-fueled economies.

Now, our community prides itself on being data-driven and science-based. Due to the complete lack of industry engagement, NOAA's assumptions are littered with inaccuracies and human safety concerns. And here are just a few.

NOAA estimates 9,300 boats will be impacted by the rule. U.S. Coast Guard boat registration data proves that 63,000 registered recreational boats will be impacted.

NOAA casts no distinction between a 35-foot pleasure boat that drafts only 3 feet versus a massive, ocean-going ship that drafts 45 feet.

NOAA estimates the annual cost of the rule to be just $46 million. Industry data puts the economic impact of the region at $84 billion, with an estimated 340,000 American jobs in jeopardy.

It is a false choice to state that Americans must choose between saving whales and allowing public access that provides economic security for small businesses and families. We can do both.

So, we appreciate the bipartisan support for appropriations language and legislation that would fund NOAA to fully explore real-time monitoring and technological options to protect marine mammals without shutting down public access or coastal economies. However, if NOAA insists on moving forward with this profoundly ill-conceived proposal, Congress must act to protect Americans and their livelihoods.

Thank you for your time.

[The prepared statement of Mr. Hugelmeyer follows:]

PREPARED STATEMENT OF FRANK HUGELMEYER, PRESIDENT & CEO, NATIONAL MARINE MANUFACTURERS ASSOCIATION

Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee: Thank you for the opportunity to appear before you today to discuss the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration's (NOAA) proposed rulemaking to amend the North Atlantic right whale vessel speed regulations.

My name is Frank Hugelmeyer, and I am the President and CEO of the National Marine Manufacturers Association—the leading recreational marine trade association in North America, representing nearly 1,300 boat, engine, and accessory manufacturers.

I speak on behalf of America's $230 billion recreational boating and fishing industry which the Commerce Department's Bureau of Economic Analysis (BEA)

confirms is the top contributor to our nation's $862 billion outdoor recreation economy. We are a made-in-America sector and a driving force for national, state, local and coastal economies, supporting 812,000 jobs and 36,000 businesses across the nation. One of the most concentrated corridors for boating activities and the vital jobs and businesses they support is the Atlantic seaboard.

A core value of our community is the protection of our shared natural resources, ocean ecosystems and marine life. Our community contributes nearly a billion dollars in annual conservation funding via the excise tax on boat fuel sales and fishing gear. And we have a long bipartisan track record of successfully working with Congress and the executive branch to develop policies that promote conservation and responsible recreation.

As America's original conservationists, our community of boaters and anglers proactively support science-based efforts to conserve our marine ecosystems and proudly collaborate with Congress and federal agencies to develop legislation and policies that strike a balanced approach between conservation and recreational access. Recent examples of this include passage of the Modern Fish Act, the Great American Outdoors Act, and the Driftnet Modernization and Bycatch Reduction Act and engagement on the administration's America the Beautiful initiative, and recreation friendly expansions to the nation's National Marine Sanctuary System.

My organization and our partners in the boating and recreational fishing advocacy space, for the last dozen years, have enjoyed a healthy and constructive dialogue when it comes to marine resource management issues of greatest interest to our businesses and to the nation's boaters and anglers. I am very sorry to say, we are now ten months into an experience with NOAA and NMFS that has been the opposite experience—minimal dialogue and zero interest in collaboration—on an issue that presents an unprecedented potential blow to boating and fishing along the entire east coast of the United States.

On July 29th, 2022, NOAA published its proposed North Atlantic Right Whale Vessel Strike Reduction Rule. This was the first time our industry had heard of these contemplated speed reduction measures. Given the sweeping scope of the proposal covering thousands of miles of coastline across twelve states, and the resulting huge direct and indirect economic impacts to coastal communities and the maritime industry, we were shocked. In contrast to our industry's previous engagements with NOAA on conservation initiatives that involved thoughtful and collaborative communications, the Federal Register notice was the first we heard NOAA was considering sweeping new speed regulations to protect these whales—and that strikes by smaller recreational boats were being considered a significant cause of lethal vessel strikes.

Current Right Whale vessel speed restrictions require all vessels 65 feet or longer to travel 10 knots or less in certain limited locations along the Atlantic Coast at certain times of the year. Under the proposed changes, all boats 35 feet and greater cannot travel faster than 10 knots (about 11 mph) within a vastly expanded area extending from Massachusetts to central Florida—essentially requiring Americans to risk their vessel and own lives in unpredictable seas by going the speed of a bicycle. These speed restrictions would apply to areas up to 90 miles offshore, for up to 7 months out of the year in some instances.

The proposal contains numerous flaws that will result in disastrous impacts to coastal communities but little protection for the whales. The proposed changes lack a data-driven approach, are based on incorrect assumptions about the number of boats covered by the rule and where those boats generally travel, and ignores basic ways that boats of this size operate—namely NOAA's modelling that made no distinction between a 35 pleasure boat that drafts only 3 feet and enormous ocean-going ships that draft 45 feet.

These flaws could have been avoided had NOAA engaged with the boating and fishing industries—a very data rich segment of the economy—to more accurately understand the proposal's impact on boating access and coastal economies, and its efficacy in protecting right whales. To put it another way, how could NOAA possibly have expected to come up with a workable, well-founded rule that would actually achieve the goal of helping North Atlantic right whales if the agency never talked with the very stakeholders most impacted by and responsible for complying with the new restrictions?

NOAA has miserably failed basic good governance tests in this instance. We now understand that the proposed rule was in development for over a year prior to publication, but solely within NOAA's Office of Protected Resources. It would have been a best practice and appropriate for NOAA to directly engage with our industry at this time. If NOAA had pursued such a path, the conversation could have started with making sure they had accurate intelligence on the actual economic impacts, the

true number of boats affected, and the design basics of how different boats within the various types and sizes in question actually move through the water.

The recreational fishing and boating community is highly engaged in any federal agency management process that impacts our sport and is highly data driven. In many cases, our industry has offered policymakers constructive scientific input and technical data that was ultimately used to develop management solutions that meet conservation goals and allow for the continued social and economic contributions our sector provides to the nation.

Unfortunately, the lack of meaningful engagement led to a proposed rule that ensures we will have excessively severe impacts on fishing and boating. Many boaters and anglers will forego boating and fishing trips altogether due to the unreasonable time, cost and restrictions imposed by the rule. This in turn will negatively impact marinas, dry dock storage, boats sales, rentals, dealers, maintenance, fishing tournaments, tour and watersport operators, tackle shops, charter and party boat operations, and many others. Fellow panelist, Fred Gamboa, will provide insights into just how hard this proposal will be on his business and countless others that represent America's small business economy.

An important aspect of this proposed rule's many flaws is how it would exacerbate challenges with enforcement of existing vessel speed restrictions pertaining to larger ships. The U.S. Coast Guard (USCG) is charged with enforcing vessel speed rules across thousands of miles of open oceans. Given their current role in national security and maritime safety, we urge the committee to review whether the USCG has the necessary resources to undertake enforcement of an expanded vessel speed program. In fact, NOAA has already acknowledged there is not sufficient funding or resources to enforce the current 10-knot speed restrictions for vessels 65 feet and greater. Yet the rule's expansion to boats 35 feet and greater would task law enforcement agencies with monitoring tens of thousands of boats and vessels across a larger section of the Atlantic Ocean. I strongly encourage this committee to work with your colleagues on the Transportation and Infrastructure Committee to reach a thorough understanding of how this proposed rule will impact the USCG's existing enforcement mandates.

While there are a myriad of inaccuracies and unjustifiable negative consequences to this proposal, the most severe are the extensive damage to coastal economies, threats posed to boater safety, and a clear lack of understanding of small recreational boat contributions to right whale vessel strikes.

NOAA claims the proposed rule changes will have an annual estimated yearly cost of $46 million. Make no mistake, this figure drastically understates the impact to even a single state budget or individual manufacturer. And it's astonishing that NOAA did no impact analysis on tax revenues critical to local, state, or federal coffers. By making boating and fishing trips in the Atlantic unsafe and nearly impossible for as much as seven months of the year, this proposal would result in the cancellation of countless trips along with the economic activity they generate. Consequently, the rule would have a devastating impact on thousands of jobs and small businesses supported by boating-fueled economies along the eastern seaboard.

The Department of Commerce's own BEA has reported the outdoor industry is a major economic engine in the U.S. Since BEA began reporting on the outdoor industry through the Outdoor Recreation Satellite Account in 2018, boating and fishing have remained the leading contributor to this critical sector. It is imperative to underscore with this committee that in Atlantic coastal states alone, 63,000 registered saltwater fishing boats are impacted, and 340,000 American jobs and nearly $84 billion in economic contributions are in jeopardy if this proposed rule moves forward.

NOAA also grossly underestimated the number of boats impacted, stipulating the rule changes will have little impact on East Coast recreational boaters and anglers affecting 9,300 recreational boats. However, a quick check of easily accessible USCG boat registration data from 2021 clearly shows 63,000 registered recreational saltwater boats measuring 35–65 feet in length along the East Coast. Had NOAA engaged with the recreational marine community, the agency would have had a better understanding of this data and the rule's potential impact on coastal economies.

Of the many questions we have presented, that NOAA has not answered, we are hoping this committee can find out how the Office of Protected Resources, within NMFS reached its economic impact figures and who specifically created the projections. The impact figures are so astonishingly low that they conveniently avoid Office of Budget of Management and Congressional triggers that demand and require greater regulatory scrutiny. If NOAA had reached out to colleagues within the Department of Commerce at BEA, they would have had far more accurate infor-

mation in their hands. BEA economists specialize in tracking and studying outdoor recreation data. Why not consult these experts?

NOAA acknowledges that various factors have contributed to the increase in right whale mortality, from entanglement in commercial fishing gear to climate change, which may increase food scarcity and thus shift migratory patterns. In NOAA's proposed rule, the agency inaccurately assumes that small boats under the 65-foot threshold are significantly contributing to right whale mortalities and strikes. I need to be extremely clear on this point: While large vessel strikes pose significant risks to the North American right whales, there is insufficient and conflicting data supporting the conclusion that small vessels are responsible for the increase in right whale mortality we have seen in the last several years.

In fact, the Tethys Research Institute found that most lethal injuries to whales were caused by large vessels greater than 80 meters or over 260 feet. When questioned, a lead researcher at Tethys mentioned to NMMA and the global boating community that recreational boat strikes were "unlikely to cause a fatality" and such strikes would most likely damage a smaller vessel and injure passengers. It is noteworthy that the boating and angling industry leadership in America has not heard of reported instances of recreational boats being disabled by right whale strikes in U.S. waters. And there is scant evidence from NOAA that proves small vessel strikes are a common occurrence.

An analysis of NOAA's own data found approximately 5.1 million recreational fishing trips were taken along the eastern seaboard by vessels 35–65 feet in length since 2008. Assuming all five right whale strikes during this time were from smaller recreational boats, and that those boats were on fishing trips, the chance of a 35–65 foot recreational boat striking a right whale during an offshore fishing trip is at most 0.000098%, or less than one-in-a-million. Attempting to prevent a one-in-a-million chance of a strike from smaller recreational boats is not an effective management strategy and highlights the futility of expanding the seasonal speed zones to boats smaller than 65 feet.

Additionally, NOAA fundamentally misunderstands how smaller recreational boats between 35–65 feet in length operate in the water. Recreational boats do not have a 10-meter draft (most have a draft of less than 1 to 2 meters). NOAA also has incorrectly assumed that smaller recreational boats have the same transit patterns as large commercial ships (they do not) and, therefore, utilized whale density estimates that overestimate the risk.

NOAA also did not take into account how small recreational boats under 65 feet are designed and used. Recreational boats are not large ocean-going vessels, which are built to cut through choppy waters and withstand turbulent weather. Requiring small recreational boats to travel at 10 knots (11 mph) in the open ocean and worsening seas increases a boat's chance of capsizing or swamping, putting boater safety at great risk. Put simply, traveling at 10 knots (roughly 11 mph) in the open Atlantic Ocean for long periods is inherently dangerous for recreational boats. Yet NOAA's proposed "go-slow zones" would extend up to 90 miles from shore—including thousands of square miles of the ocean where North Atlantic right whales have not been observed in decades, or ever—forcing recreational boaters and anglers to forego their pastime altogether for fear of their personal safety.

Given the social, health, economic and conservation benefits of recreational fishing and boating to the nation, and the glaring flaws that justify the proposed rule, more deliberation and analysis is needed to a balance conservation goals with measures that protect boating access, boater safety, and coastal economies. Fortunately, there are constructive developments outside NOAA's regulatory process that stand to put us on a balanced path.

First, the James M. Inhofe National Defense Authorization of 2022 included authorization of a pilot project for real-time monitoring aimed at protecting right whales and directed at identifying core foraging habits, important feeding breeding, calving, rearing, or migratory habits that co-occur with areas of high risk of mortality, serious injury, or other impacts to whales such as vessel strikes. Within three years, the Coast Guard is directed to design and deploy a program that 1) comprises the best available detection survey technologies to detect right whale foraging habits, 2) uses dynamic habitat suitability models to inform right whale occurrence in core foraging habitats at any given time, 3) coordinates with the federal ocean observation and maritime traffic services, 4) integrates historical data and new near real-time monitoring methods and technologies as they become available, 5) accurately verifies and rapidly communicates detection data, 6) creates standards for ocean users to contribute data to monitoring system, 7) and communicates the risks of injury or large whales to ocean users to further mitigate the risk of vessel strikes.

The data and information this program will provide are paramount to shaping science and data-based policy as it pertains to vessel speeds and interactions with right whales. NOAA should be required to have this data in order to move forward with any expansion of the existing North Atlantic right whale vessel speed restrictions. Our industry is working attentively to ensure this program is adequately funded in the FY24 appropriations process to prevent any delays to the implementation of this critical program.

Second, there are mitigation technologies being tested internationally that should be considered and utilized before restricting U.S. waters. The Tethys Research Institute conducted a study in the Mediterranean Cetacean Sanctuary (located along the Italian and French coast) that analyzed how best to deal with threatened whale populations and high levels of maritime traffic and nautical activities. Strike mitigation strategies being tested in this region include the use of REPCET software, drones and other detection devices that notify vessels that they are likely to encounter a cetacean on their route and then advise slowing down for several miles. The U.S. Commerce Department would be smart to follow the examples of Italy and France who are working to protect both the endangered whales and their dynamic boating, fishing and tourism economies.

Third, since the proposed rule was published last fall, our industry launched the Whale and Vessel Safety (WAVS) Task Force for the purpose of identifying, developing and implementing technology and monitoring tools in the marine industry and boating community with the goal of mitigating the risk of vessel strikes to all marine mammals, with special attention to right whales. So far, the task force has projects underway examining and utilizing risk terrain modeling to identify places of highest risk for whale strikes and inform actions/resource based on that risk. The task force is also evaluating how marine radar algorithms and artificial intelligence can be used to more accurately detect and alert vessel operators of the presence of whales. Like in the Mediterranean, technology innovations stand to play an important role in addressing right whale conservation in the Atlantic, yet NOAA's proposal did not take into account how technology could be a valuable tool in minimizing vessel strikes to right whales. WAVS Task Force representatives have made numerous requests to NOAA for agency engagement that went unanswered for months.

Ultimately, it is unclear if NOAA has the statutory or constitutional authority to issue such sweeping regulatory restrictions impacting the American people. The agency's proposed action would restrict a significant portion of the American economy and amount to a total transformation of the Atlantic coast, but NOAA has not pointed to any clear congressional authorization to regulate in this manner. Instead, the agency relies on its ability to promulgate regulations that are "necessary and appropriate." This is not, and cannot be, an open-ended authorization for the agency to take any action without limitation. Questions of such deep economic, societal, and public policy significance, like severely restricting public access rights for millions of Americans, using satellite safety technology to track and fine American citizens, or setting expansive regulations that impact the economic foundations of the entire Atlantic seaboard, should only be addressed by Congress.

Despite all of the above, the boating industry looks forward to working collaboratively with the members of this subcommittee, other committees of jurisdiction, and NOAA toward a balanced solution that protects right whales while minimizing adverse impacts on recreational boating access and coastal economies. The marine industry can be passionate about whale protection and vehemently against this ill-conceived and over-reaching regulation. It is a false choice to state that Americans must choose between saving whales and allowing public access that provides economic security for small businesses. We can do both. By working together, we can develop data-driven, reasonable solutions that protect our natural resources and way of life, including developing and implementing available and/or newly advanced whale-tracking and monitoring technologies that protect North Atlantic right whales, without jeopardizing consumer safety, public access or coastal communities.

However, if NOAA chooses not to stand down on this profoundly ill-conceived proposal, it will be imperative for Congress to step in. We appreciate the bipartisan support for appropriations language and legislation that would fund NOAA to fully explore real time monitoring and other technological options to protect marine mammals without needlessly shutting down public access and coastal economies. We hope NOAA listens and changes course. If that doesn't happen, the American people will need Congress to act on their behalf.

Thank you for the opportunity to appear before the committee.

Addendum

Below is a list of concerns on numerous aspects of the proposed rule with additional background. NMMA along with industry stakeholder partners pointed out these concerns in a letter to NOAA on October 3, 2022, and we have not received a reply. We respectfully request Congress to require responses from NOAA on these questions.

1. Seasonal Speed Zones (Currently Referred to as Seasonal Management Areas)

The proposed rule significantly expands the geographic scope of the existing SSZs to encompass almost the entire East Coast. NOAA justifies this expansion on shifting right whale migratory patterns and the need to reduce human induced right whale mortality events from vessel strikes and uses a complex risk model to justify the scope of the proposed changes. The risk model simulates the likelihood of a fatal vessel strike in space and time using various sources of right whale and vessel traffic data. NOAA risk analysis resulted in a proposed expansion of SSZs but actual data on real-word mortality supports the maintenance, not the expansion of the existing SSZs. For example, NOAA notes that since 2008, four of the five strike mortality events involving vessels less than 65 feet occurred *inside* active SSZs. Therefore, the observed data suggest that an 80% reduction in realized mortality since 2008 could have been achieved if vessels less than 65 feet were added to existing SSZs. Instead, NMFS opts for a vast geographic expansion of SSZs from Massachusetts to north Florida based on projected risk when realized risk indicates existing SSZs would be an effective management strategy to achieve conservation goals for the 35–65 foot vessel class. To be clear, our industry is not expressing support for applying the proposed restrictions to the existing SSZs, but rather pointing out these issues as an example of NOAA's failure to draw reasonable conclusions from the best data available.

2. Dynamic Speed Zones (Currently Referred to as Dynamic Management Areas)

To address the potential for vessel strikes in areas outside SSZs, NOAA is proposing to replace existing voluntary Dynamic Speed Zone (DSZ) requirements with mandatory DSZs for vessels 35 feet and larger. DSZs are triggered when right whales are visually or acoustically observed in a specific, discrete area. Practically speaking, DSZs with high vessel traffic should have the highest risk of vessel strikes with right whales because right whales are known to be present. Yet, to our knowledge, since 2008, none of the 35–65 foot vessel strike mortalities occurred in a DSZ, despite the higher risk of right whale and vessel collisions. Voluntary compliance with DSZs by these smaller vessels could partially explain the lack of mortality events, but NOAA speed rule assessment determined that vessel cooperation with DSZs is low, and therefore, the reduction in risk provided by the voluntary DSZs is minimal (NMFS, 2020). Again, it is contradictory that in areas where vessel strike probability is highest (in high traffic DMZs) associated right whale mortality is lowest. This again speaks to the flaws in NOAA's risk modeling in the unsupported conclusions the agency has drawn to justify the proposed rule.

3. Estimating Risk of a Recreational Vessel Strike

In an impact analysis for this proposed rule commissioned by the American Sportfishing Association, Southwick and Associates analyzed historical data to better characterize the actual risk from recreational fishing boats in the 35–65 foot size class to right whales (Appendix A). Using NMFS Marine Recreational Information Program (MRIP) effort data published by NOAA, they estimated there have been over 92 million offshore fishing trips taken since 2008 in states within the proposed expanded SSZs. Of these trips, they conservatively estimate using vessel registration data, that at least 5.1 million were taken by vessels 35–65 feet in length. Assuming that all five documented right whale strikes were from recreational vessels, and that all these vessels were on fishing trips, the chance of a 35–65 foot recreational vessel striking a right whale during an offshore fishing trip is less than one in 1,000,000. Furthermore, this analysis only includes recreational fishing trips and does not include recreational vessel trips that occur for other reasons. Therefore, it is reasonable to assume that many more non-fishing trips occurred as well, and non-recreational vessels may have been responsible for one or more of the strikes, meaning the actual probability is likely much lower than Southwick's estimate.

While this analysis demonstrates that the chances of a recreational boat striking a right whale is exceedingly rare, it also shows that in general, the recreational

fishing and boating sector does not pose a significant threat on an individual right whale level. Despite considerable boat activity, recreational boats are not interacting with right whales at a rate consistent with the NOAA risk model.

Finally, NOAA is using unrepresentative whale density values, thereby creating a significant bias in the risk model. NOAA's own technical memo states that, "*the high densities predicted along the mid-Atlantic may not be realistic*." These inflated density values feed the risk assessment model and produce outcomes that are inconsistent with actual risk and the occurrence of known strikes. The model also served as a primary tool in the development of the proposed rule, thus, the density bias is reflected in those expansive measures. NOAA acknowledges that model development and evaluation is ongoing to address this source of bias. Noting this inherent bias and the ongoing work on the model, it would be irresponsible and unreasonable to move forward with the proposed rule until these issues are fully resolved.

4. Number of Recreational Vessels 35–65 Feet and Fishing Trips Impacted

Further exploration of available datasets underlying NOAA's proposal indicates its NEPA Environmental Analysis (EA) underestimates the number of anglers, boaters, and economic impact associated with the proposed rule. For example, NOAA identifies 9,200 recreational vessels that will be impacted by the proposed rule. However, based on 2021 vessel registration data analyzed by Southwick Associates, there were more than 63,000 registered recreational saltwater vessels measuring 35–65 feet in states across the proposed SSZs. Furthermore, an analysis of MRIP trip data from 2019–2021 reveals 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 3 miles offshore in states with proposed SSZs during the months when the speed restrictions would be in place. NOAA must address the EA's shortcomings through preparation of an Environmental Impact Statement, and include a more thorough and accurate investigation of the number of recreational vessels impacted, speeds needed for offshore trips to be viable, and the true costs and economic impacts of the lost fishing opportunities associated with the proposal, as they clearly exceed the $1.2 million claimed (see Appendix A).

5. Establishing the 35–65 Foot Vessel Size Class

NOAA posits that current right whale speed zones do not address the threat of strike mortalities involving vessels less than 65 feet and proposes to extend vessel speed restrictions to a 35–65 foot vessel size class. However, since 2005, only a total of six fatal vessel strikes occurred involving vessels 42–54 feet. NOAA additionally references Canada's expansion of the vessels covered by dynamic mandatory 10-knot speed restrictions in the Gulf of St. Lawrence in 2019 to include vessels 43 feet or greater in length. Thus, even if one accepts NOAA's flawed rationale for the proposal, the data suggest a smaller vessel size class of 42–65 feet is more justifiable than the proposed 35–65 foot size class. At a minimum, it brings into question how 35 feet was selected as the low end of the range since vessels around this size have not been responsible for any right whale vessel strike mortalities in the U.S. The proposed rule appears to argue that extending speed restrictions to smaller vessels will help address safety concerns as vessel strikes pose a threat to human life. As stated, we value minimizing safety concerns from strike occurrences, but given the rarity of vessel strikes in the 35–65 foot size class, we expect more safety concerns and threats to human life will occur from the proposed vessel speed restrictions, due to forcing boaters to spend more time on the water in potentially unsafe conditions, than the highly improbable chances of smaller boats striking a right whale.

6. Misestimate of Draft Depths for 35–65 Foot Recreational Vessels

The NOAA Technical memorandum NMFS-SEFFSC-757, may vastly overestimate the probability of a recreational vessel 35–65 feet interacting with a right whale. The model assumes a 10-meter (m) draft depth criteria when calculating vessel strike risk. Recreational vessels in this size class rarely have a static draft that exceeds 2 m. For example, a 35 foot center console has a static draft of 1.01 meters and a 64 foot sportfish boat has a static 1.7 m draft. Given that most recreational boats in this size class are planing or semi-planing hulls, once at speed their draft is further reduced. The result is that these boats have minimal intrusion beyond the upper 6 feet (2 m) of the water column. Assuming that this class of boats poses a right whale vessel strike risk beyond 2 m of depth is simply invalid. Based on this fact alone, we believe the vessel strike risk attributed to vessels 35–65 feet is overestimated at a minimum of 80%. Risk posed for right whales comes not only from the boat and whale being in the same location, but also the boat being deep enough to strike the whale.

7. Overlap of Speed Rule with Known Recreational Fishing Seasons

The date ranges of the proposed SSZs conflict with many popular inshore and offshore recreational fishing seasons currently managed by the three Atlantic regional fishery management councils, NMFS Highly Migratory Species Division, and the Atlantic States Marine Fisheries Commission. For example, we evaluated NOAA's MRIP catch data from 2017–2021 across all waves to determine the proportion of recreational catch occurring in waves overlapping with the timing of proposed SSZs. As expected, we found that several recreationally important species, including but not limited to cod, haddock, bluefish, black sea bass, striped bass, tautog, Spanish mackerel, dolphinfish, and wahoo, have a significant amount of catch that overlaps with the timing of proposed SSZs (see Appendix B). Although these data are not specific to vessel size class, they demonstrate that NOAA's inaccurate assumption that colder weather and rougher sea conditions will result in lower boating activity during the timing of proposed SSZs needs further exploration. We are concerned that NOAA has failed to directly engage the regional fishery management bodies to reduce the overlap between proposed changes to the timing of SSZs and recreational fishing seasons as much as possible. Additionally, there are other recreational fishing seasons for highly migratory species that overlap with the proposed SSZs and are not sampled by MRIP (e.g., bluefin tuna).

8. Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis

NMFS is required to conduct a thorough evaluation of impacts of the proposal to the human environment; however, the Draft Regulatory Impact Review (RIR) for this proposal provides conflicting economic analyses for benefits versus impacts. For example, the RIR cites a 2020 NOAA study that estimated the direct economic output of six whale watching operations within Stellwagen Bank National Marine Sanctuary at $95.1 million (Schwarzmann, 2020). In contrast, the RIR estimates $46.2 million from the proposed rule cumulative impacts for all vessel size classes and regions combined. It is difficult to understand how the economic benefits of six whale watching operations exceeds the economic impact of 9,200 recreational vessels, a vessel number likely underestimated based on Southwick's findings. Furthermore, the RIR includes no indirect impact analysis, but indirect benefits from whale watch operators is included by reference in the benefits section. We question that NMFS was unable to compile any indirect economic impact information for recreational vessels especially when NMFS regularly publishes a Fisheries Economics of the United States report. These points call into question the thoroughness and accuracy of NMFS' analysis. NMFS cannot move forward with the rulemaking without understanding the true economic impacts of the proposed vessel speed restrictions.

9. Enforcement Concerns of the Proposed Rule

Currently, right whale speed restrictions are enforced almost exclusively by evaluating Automatic Identification Systems (AIS) data. AIS data are analyzed to determine if a vessel has exceeded the speed limit within a seasonal speed restriction zone. AIS is a piece of marine electronics equipment made mandatory for certain vessels over 65 feet to improve the navigational safety of the vessel and other vessels operating in the area. AIS is not required on recreational vessels 35–65 feet, thereby making the primary enforcement tool of the right whale speed restrictions unavailable for many boats 35–65 feet. In short, enforcement of the proposed rule would be impractical, if not impossible. Additionally, there are no indications that development of legislation to amend 46 USC 70114 has begun or will be initiated in the near future. This leaves the proposed rule, as written, with an extremely low likelihood that it can be enforced.

The technological limitations of AIS make the enforcement of speed limits based on its data unreliable. Positional information transmitted through AIS can carry sufficient variation, as a function of the rate of transmission and sea state, that can produce a range of estimated speeds. This variability can be particularly considerable during high seas and heavy weather conditions. Furthermore, certain conditions, such as a following sea or entering an approach on a flood tide, may result in a vessel exceeding a 10-knot limit through its AIS data (speed over ground) but its speed through the water is at or lower than the 10 knots because of additive vectors in like direction. During these conditions, a vessel must increase speed to maintain adequate steerage. The rule would clearly create scenarios where operators may be forced to run a boat at an unsafe speed in fear of AIS triggering a speed violation.

It is also important to point out that AIS is a tool that was developed and mandated for use in certain vessels to improve navigational safety. It was not designed or intended to be used as a tool to enforce spatial or fisheries management regulations. Many vessels under 65 feet voluntarily carry and operate AIS for the added safety-at-sea benefits gained from the technology. It is a very real concern that operators of boats less than 65 feet may decide to turn off their AIS safety systems in fear of triggering a speed restriction enforcement action.

10. Updates to Safety Deviation Provisions

NOAA provides a safety deviation provision as part of the proposed rule. The deviation provision is only applicable to vessels less than 65 feet, allowing those vessels to transit at speeds greater than 10 knots within areas where a National Weather Service Gale Warning, or other National Weather Service Warning for wind speeds exceeding those that trigger a Gale Warning is in effect. The National Weather Service defines Gale force wind speeds at 39–46 mph. We question how NOAA arrived at a Gale force threshold because, from recreational boating experience, vessels 35–65 feet cannot operate safely at 10 knots during wind speeds exceeding approximately 25 mph. Therefore, we suggest NOAA lower the wind speed deviation threshold to at least 25 mph to ensure safe vessel operation at sea.

It is also important to note that vessel speed is a significant safety feature on a recreational boat. Most recreational boats lack high displacement hull design that often provides ocean going and commercial vessel stability and the ability to operate safely in significant sea states. Recreational vessels utilize speed to conduct fishing and other recreational trips during weather windows of opportunity. To comply with a 10-knot speed limit, recreational boats could be forced to operate during conditions that would compromise safety of the passengers and vessel. Speed is also a safety asset in the event of localized weather events such as thunderstorms where a vessel could return to port or avoid a line of thunderstorms with the ability to operate above 10 knots. The proposed rule would unfairly deprive a primary safety feature of recreational boats 35 feet and larger.

Operating at speeds that do not exceed 10 knots, for most recreational boats, forces the vessel to operate at a less than optimal speed and angle of attack. Operating at these speeds raises the bow which reduces the visibility of the operator to see and avoid hazards in the water, including right whales. Most recreational boats have hull designs that allow the boat to ride level when on plane. Operator visibility is optimized when a boat is on plane. Thus, the proposed rule may actually have the unfortunate consequence of reducing operator visibility and elevating the risk of collisions.

11. Exploring Technological Advancements and Mariner Outreach

Halting the proposed rule would provide opportunity to focus on two key areas of interest that warrant discussion. First, technology that can deliver real-time monitoring of individual right whales continues to advance. From direct observations, aerial surveillance, acoustic detection, heat signature technology, satellite monitoring and ambient DNA signatures found in water samples, it is feasible to gather real-time location information on a significant portion of the right whale population. Fewer than 350 individual right whales remain, which makes tagging or other high-value monitoring techniques possible. If all right whales cannot be tagged or monitored, perhaps efforts could be focused exclusively on mature female right whales, roughly 100 individuals, to protect the most reproductively valuable segment of the population. Even if monitoring of all right whales is not possible, we can expect any real-time monitoring to provide ancillary protection to non-monitored right whales because of their grouping behavior. This approach would be consistent with the criteria used to trigger DSZs. Outreach could also be conducted with the recreational fishing and boating community on ways they can provide direct observations of right whales to NOAA.

The second key portion of this effort is the need to disseminate information to mariners and other vessel operators. Distributing this information to anglers and boaters and into their marine electronics is essential. This is something NOAA continues to struggle with given the lack of outreach to the recreational fishing and boating community following the implementation of the 2008 measures. As mentioned, on the rare occasion when recreational boats unintentionally interact with right whales, the outcome often results in risk to human life. Our industry would welcome developing ways to provide real-time positioning on navigational hazards, including right whales, to vessel operators.

12. Need for Stakeholder Engagement

We question why stakeholder engagement was not a significant part of the process for developing the proposed vessel speed rule, considering known significant impacts to recreational fishing and boating. For years, NOAA has used the Take Reduction Team (TRT) model to work collaboratively with the commercial fishing industry to develop management solutions that address commercial fishing gear-related whale mortality. Even if the Marine Mammal Protection Act doesn't require TRTs for a vessel speed rule, it shows a lack of responsibility that NOAA did not use the TRT model to engage the recreational fishing and boating community in the development of this proposed rule.

QUESTIONS SUBMITTED FOR THE RECORD TO FRANK HUGELMEYER, PRESIDENT & CEO, NATIONAL MARINE MANUFACTURERS ASSOCIATION

Mr. Hugelmeyer did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Questions Submitted by Representative Nancy Mace

Question 1. Could a recreational boat under 65 feet be in serious danger of capsizing or swamping if forced to cap its speed at 10 knots?

Question 2. In NMMA's letter to NOAA, you explain the recreational boating industry alone creates $230 billion in economic impact per year. On the Eastern seaboard, recreational boating and fishing support 340,000 jobs and nearly $84 billion in economic activity. Do you believe the proposed rule could put these jobs in danger?

Mr. BENTZ. Thank you.

I now recognize Mr. Diamond for 5 minutes.

STATEMENT OF CLAYTON L. DIAMOND, EXECUTIVE DIRECTOR, AMERICAN PILOTS' ASSOCIATION, WASHINGTON, DC

Mr. DIAMOND. Good morning, and thank you, Mr. Chairman, Ranking Member Huffman, and Subcommittee members. We appreciate this opportunity today.

APA has been the national association of the piloting profession since 1884, and we represent pilots in the coastal and Great Lakes states. Our members handle well over 90 percent of all large vessels, ocean-going vessels, moving in U.S. waters.

While APA strongly opposes the planned changes to the speed rule, we will continue working to protect the right whales. In fact, pilot boats have been offered to evaluate whale detection technologies as we speak.

But I will be blunt: If NOAA's proposed changes are adopted, it will endanger pilots and pilot boat crews. It will raise the likelihood of a marine accident involving a large commercial ship, and it will negatively impact the maritime supply chain. And this isn't my opinion. This is the opinion of working pilots. These women and men are the most skilled mariners in the world, and they know best the challenges of handling large commercial ships in narrow offshore channels.

NOAA's proposed changes include reducing the size of vessels from 65 to 35 feet, radically changing the navigation safety deviation clause and doubling the size of the speed zones to blanket the

entire East Coast. We respectfully ask you to consider legislation to stop these changes.

I will summarize my opposition now, but my written testimony goes into much more detail.

Lowering the applicability to 35 feet would capture all of the offshore pilot boats, and would endanger pilots and the boat crews. Pilot boats deliver and retrieve the pilots who navigate these massive commercial ships. Even in the most benign conditions, transferring pilots between pilot boats and ships is dangerous: eight pilots in the United States have died during the transfer process since 2006, and three international pilots have died this year alone during the transfer process. Pilot boats must approach large moving ships at speeds sufficient to provide a stable platform for the transfer. NOAA's proposal would make an already dangerous operation more unsafe by forcing pilot boats and the ships to operate at speeds below safe operating parameters.

And it is not an option to use pilot boats less than 35 feet. It would be unsafe to go 10 to 20 miles off shore in such small boats, especially in the harsh winter months, when the speed restrictions are in place.

And significantly, according to NOAA's own data, there has never been a right whale strike by a pilot boat.

So, the speed regulation with the changes that are proposed aren't necessary to protect the right whale, but they would have the unintended consequences of endangering humans.

The application of the speed restrictions to pilot boats will also delay merchant ships getting in and out of port. Many East Coast pilot boarding areas are up to 20 miles offshore. So, while awaiting a pilot in these areas, ships, for safety reasons, are spaced miles apart. If pilot boats are restricted to 10 knots while shuttling pilots, ships will be delayed, and then the supply chain will suffer.

NOAA's proposal would also threaten safe navigation of large vessels in narrow offshore channels. And I am going to list the ports that would be impacted, just to illustrate what an impact this would have on the supply chain. It would be Boston, New York, New Jersey, Philadelphia, Baltimore, Norfolk, Wilmington, Charleston, Savannah, Brunswick, Jacksonville, and Canaveral. These entrance channels were designed by the Army Corps of Engineers for conventional speeds, and they are simply too narrow for slower speeds.

Pilots frequently must go faster than 10 knots to combat the lateral forces of wind and current acting against the ships, just to keep the ship in the channel. Similarly, speed is also needed to maintain control of the ship while passing other large ships. If ships depart the channel and go aground or lose control and collide, an oil spill or a port closure is the likely consequence.

These massive, mostly foreign ships are deemed such a high risk to enter and depart U.S. ports, they are required by law to take a local pilot to ensure they are safely navigated. Pilots, in turn, are mandated by law to navigate at safe speeds and maintain control of their vessels. And pilots do maintain control of their vessels. NOAA data shows that there has never been a right whale strike by a piloted ship in a Federal navigation channel. NOAA's data.

Pilots must always be free to use their judgment to safely maneuver these massive vessels. This is why in 2007, APA worked with NOAA to include a navigation safety deviation clause in the regs. NOAA's proposed changes to this clause are unworkable, and even suggest criminal charges for good faith safety decisions.

This is unfair and, as explained in my written testimony, could impact port and supply chain efficiency.

I want to end by saying that we are committed to working with NOAA and Congress to protect the maritime environment, safeguard marine life, keep maritime commerce moving safely and efficiently, all while keeping pilots and pilot boat crews safe. Thank you very much.

[The prepared statement of Mr. Diamond follows:]

PREPARED STATEMENT OF COMMANDER CLAYTON L. DIAMOND, U.S. COAST GUARD (RETIRED), EXECUTIVE DIRECTOR—GENERAL COUNSEL, AMERICAN PILOTS' ASSOCIATION

Good morning Chairman Bentz, Ranking Member Huffman and all members of this subcommittee. I am Clay Diamond, Executive Director-General Counsel of the American Pilots' Association (APA). APA appreciates the invitation to testify today before the House Committee on Natural Resources, Subcommittee on Water, Wildlife, and Fisheries at an oversight hearing titled, "Examining the impacts of the National Oceanic and Atmospheric Administration's proposed changes to the North Atlantic Right Whale Vessel Strike Reduction Rule.

APA remains committed to working with National Oceanic and Atmospheric Administration (NOAA) to protect the North Atlantic Right Whale (NARW), but we strongly oppose and are deeply concerned with the proposed National Marine Fisheries Service's (NMFS) amendments to the existing NARW Vessel Strike Reduction Rule. We urge this subcommittee to consider legislative action to ensure that NOAA does not promulgate amendments to existing regulations that will endanger maritime pilots, negatively impact the safe navigation of large-ocean going cargo vessels in restricted federally improved offshore channels, and reduce port efficiency along the East Coast.

APA has been the national association of the piloting profession since 1884. Virtually all of the more than 1,200 State-licensed pilots working in the coastal ports and approaches of the United States, as well as all the U.S.-registered pilots operating in the Great Lakes system under the regulation of the U.S. Coast Guard, belong to APA-member pilot groups. APA pilots handle well over 90 percent of all large ocean-going vessels moving in international trade in the waterways of the United States.

APA and its members have been working closely with NOAA for over 20 years to protect the NARW. In fact, the very purpose of state compulsory pilotage is protecting the waters and marine environment while keeping maritime commerce moving safely and efficiently. This is a duty that every pilot takes to heart. Pilots care immensely about the waters and the marine environment as they work, live, raise their families, and recreate on the waters they pilot. It was the APA and pilots who worked with NOAA in 2007–2008 to include the navigation safety deviation clause in the original speed regulations. This clause allows vessel masters and captains to exceed 10 knots if ocean, weather and other conditions dictate.

Likewise, all of my professional life I have been working to ensure the safety of navigation and the protection of the marine environment, including marine wildlife. For the past 15 years, I have worked to uphold the principal duty of state-pilotage: to protect the waters and marine environment in compulsory state-pilotage waters while facilitating the safe and efficient movement of commerce on America's waterways. Before I joined APA, I was a career U.S. Coast Guard officer, spending 20 years in the Coast Guard working to protect the safety of navigation and our marine environment. I have worked in organizations dedicated to protecting navigation and the marine environment my entire adult life.

While APA has spent decades working proactively with NOAA, we have serious concerns over a recent Notice of Proposed Rulemaking (NPRM)[1] from NOAA that would apply the agency's marine mammal speed restrictions to pilot vessels and significantly alter the speed restriction's navigation safety deviation clause.

As you may know, NOAA has used the authority granted under the Marine Mammal Protection Act to promulgate regulations (*see* 50 CFR § 224.105) that impose seasonal speed restrictions along the East Coast aimed at protecting the NARW from vessel strikes. These regulations, which currently limit vessels 65 feet and larger to 10 kts during half of the calendar year, have been in place for many years and pilot groups on the East Coast have adapted operations and built pilot vessels to comply with these regulations.

NOAA proposes amendments to existing regulations that would apply the seasonal 10 knot speed restriction to all vessels greater than or equal to 35 feet, (the rule currently applies to vessels greater than 65 feet), which would capture all offshore pilot boats on the East Coast. The proposal would more than double the existing area in which this speed restriction is applicable to nearly 40,000 square miles, blanketing the entire U.S. East Coast with Seasonal Speed Zones (SSZ). Finally, the proposed rule would make significant changes to the existing navigation safety "deviation clause," (the provision that allows vessels to exceed the 10 knots speed restriction for navigation safety). These are radical changes to existing regulations.

The APA strongly opposes the proposed amendments to the NARW speed restriction regulations because the application of speed restrictions to pilot boats and the significant expansion of SSZs would increase the dangers faced by pilots and pilot boat crews, reduce navigation safety in Federal Navigation Channels and pilot boarding areas, and negatively impact port operations on the entire East Coast. APA also strongly opposes the proposed changes to the administration of the navigation safety "deviation clause" because the proposed changes run the risk of substantially and negatively impacting the master-pilot relationship that is so critical to navigation safety in pilotage waters.

We, along with numerous members of industry, including the ports, shipping organizations, and maritime labor—all of the major components of the U.S. maritime commerce supply chain—have submitted comments to the rulemaking docket to try to persuade NOAA to rethink parts of its proposal. We have specifically objected to those NOAA proposals that would increase the dangers pilots already face, threaten the navigation safety in the Federal Navigational Channels, and negatively impact maritime commerce on the East Coast. We are hopeful that this committee would consider legislative action to preclude NOAA from amending the existing speed restrictions.

Foremost, the proposed regulations would be dangerous for pilots and pilot boat crews.

Pilot transfer operations (when a pilot transfers from a pilot vessel to larger ocean-going vessels) are inherently dangerous. The proposed rulemaking would make these operations even more dangerous as it would force both pilot boats and commercial vessels to operate outside of the ideal safe operational parameters to conduct such pilot transfers. There have been 8 pilot fatalities during pilot transfer operations in the U.S. since 2006, and we are aware of 3 international pilot fatalities during transfer operations in this calendar year alone. Pilot transfer operations are unavoidably dangerous and there is no reason to make them even more dangerous.

Pilot boats, many of which on the East Coast were purposefully designed—in good faith reliance on NOAA's existing NARW speed restriction regulations[2]—to be just shy of 65 feet in length, must routinely operate in and among swirling winds and currents and near dangerous shoals and other hazards to navigation in order to deliver pilots to waiting or departing commercial vessels that are often great distances from shore.[3] These boats must approach moving vessels at speeds care-

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[1] This NPRM is available at: https://www.govinfo.gov/content/pkg/FR-2022-08-01/pdf/2022-16211.pdf

[2] These pilot associations have—and continue to—carefully invested tens of millions of dollars in pilot boats that cannot only meet the necessary and detailed operational requirements, but also comply with the size threshold provisions in the NMFS speed restriction regulations. If NOAA follows through with these changes as proposed, applying the speed restriction regulations to vessels smaller than 65 feet would not only potentially endanger pilots and pilot boat crews and negatively impact efficiency, but it would also unfairly subject these pilot associations to crippling financial penalties.

[3] In many ports along the East Coast, operational requirements dictate that pilot boats routinely venture more than 10 or even 20 nautical miles offshore. These distances continue to

fully calculated to bring the boat alongside the ship at the best possible angle and moment to facilitate what is, even in the most benign of conditions, a dangerous personnel transfer operation. Once alongside, the pilot boat operator is charged with providing a stable platform so the pilot is able to reach over and transfer to a pilot ladder, which is oftentimes hanging over the side of a large ocean going vessel from 30 to 70 feet.

For many pilot boats, which are designed with semi-displacement hulls, it takes at least 17 knots to get the boat "on plane", and then 14+ knots to keep the boat planed. When the pilot boat is not on plane, the bow protrudes higher above the water line and blocks the pilot boat operators' vision.

This creates a dangerous condition when the pilot boat operator is steering the pilot boat alongside a much larger vessel so that the pilot may transfer onto and climb up a ladder to board the vessel to be piloted. During an already dangerous personnel transfer operation is not a time to limit the pilot boat operator's vision. Additionally, the pilot boat is not as maneuverable in the water when it is not on plane. In many instances, it would not be safe to operate a pilot boat in this type of environment at 10 knots or less and imposing an artificial—and arbitrary[4]—speed restriction is imprudent.

It is not a viable option for pilot associations along the East Coast to use pilot boats that are less than 35 feet in length. It would be simply unsafe for pilots and pilot boat crews to venture 10–20 miles offshore, especially in the harsh elements of the winter months when the seasonal speed restrictions are in place, on vessels smaller than 35 feet.

Finally, according to NOAA's own data, there has never been a NARW strike by a pilot boat. This is not by happenstance. Pilot boat operators are licensed professional mariners and among the best small boat handlers in the world. Including pilot boats in the NARW speed restriction regulations is not necessary to protect this endangered species, but, tragically, these proposed changes to the speed reduction rule could result in less protection for pilots.

Despite concerted efforts by pilots, pilot groups, APA, the Coast Guard and international organizations, pilot transfer operations are still unavoidably dangerous. There is no reason to make the pilot transfer process even more dangerous than it already is, especially since it will not appreciably improve NMFS's efforts to protect NARWs.

Second, a speed restriction imposed on pilot vessels would negatively impact marine and navigation safety by increasing pilot fatigue.

Another safety concern involves the pilots' trip out to meet these large ocean-going vessels. Pilot boats were designed so as not to subject pilots to long, pounding pilot vessel transits that would significantly add to pilots' and pilot boat operators' workload and fatigue levels. Rather, pilot boats are meant to transfer pilots to and from commercial ships quickly, efficiently, and safely. If pilots were forced to transit at 10 knots or less, this would dramatically increase the risk of fatigue. The dangers of mariner fatigue are a principal factor that can negatively impact mariner well-being, marine operations, and navigation safety. This is a fact that has been noted by both the U.S. Coast Guard[5] and the National Transportation Safety Board.[6]

Third, the proposal to apply the speed restriction in Federal Navigation Channels and change the deviation clause is a danger to the safe navigation of large ocean-going vessels and an unworkable administrative burden during a critical time for vessel safety.

The NMFS's proposal would more than double the existing area in which this speed restriction is applicable to nearly 40,000 square miles, blanketing the entire U.S. East Coast with Seasonal Speed Zones (SSZ), including most of the Federal Navigation Channels (FNC) and pilot boarding areas on the East Coast. The

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grow as dredging projects extend the federally improved channels even further offshore to accommodate ever larger commercial vessels.

[4] Since the NARW speed restrictions became mandatory in 2008, NMFS has never fully explained nor answered our questions as to why 10 kts is markedly better at reducing the risk of ship strikes of NARWs than, for example, 12 kts, 15 kts, 18 kts or even faster.

[5] *See* U.S. Coast Guard Navigation and Vessel Inspection Circular No. 02-08 (NVIC 02-08), Criteria for Evaluating the Effectiveness of Crew Endurance Management System (CEMS) Implementation. "A large number of casualties have been specifically attributed to the human factor of crew fatigue. Fatigue is also known to play a contributing role in casualties where other types of human factors are present (e.g., situational awareness, operator decision making)."

[6] *See* National Transportation Safety Board Accident Report (NTSB/MAR-11/04 PB2011-916404), recommending that States that oversee pilot systems ensure that pilot organization "implement fatigue mitigation and prevention programs."

proposed SSZs would cover approaches to the major ports of Boston, New York/New Jersey, Philadelphia, Baltimore, Norfolk, Wilmington, Charleston, Savannah, Brunswick, Jacksonville, and Canaveral. FNCs are coastal channels and waterways that are maintained and surveyed by the U.S. Army Corps of Engineers. These channels are necessary transportation systems that serve all the East Coast ports, and are vital to the nation's economy, supply chain, and national security interests. Pilot boarding areas are locations at sea where pilots familiar with local waters board incoming vessels to navigate their passage to a destination in port. These areas are displayed on navigational charts produced by NOAA and are necessary to support state compulsory pilotage.

The navigational challenges associated with bringing larger and larger—mostly foreign—ocean-going vessels into and out of port through narrow and restricted FNCs are immense. In fact, Coastal States have determined that the risks associated with these massive ships entering or departing port is so great that these ships must, as a matter of law, be under the direction and control of state-licensed compulsory pilots. Safely navigating these ever-growing ships demands that pilots are free to maneuver these vessels in the best interest of safe navigation without worrying about artificial constraints. Unnecessarily limiting the speed of large commercial vessels entering and departing our Nation's ports will have a devastating impact on the safe navigation of these vessels. We are aware of no studies or research directed by NOAA to assess these risks. However, the U.S. Coast Guard has documented their concern for the deleterious effects of reduced speed in dredged channels subject to ocean conditions, and the Army Corps of Engineers' Research and Design Center has commissioned one formal study and conducted several informal simulations quantifying the risks identified above. It remains disappointing that NOAA has proposed this rulemaking apparently without consideration for the concerns and the research of their partner agencies with whom they share domain over navigational safety.

The current NOAA speed reduction regulation includes a navigation safety deviation clause which permits vessels to exceed 10 knots when safety concerns require it. (*see* 50 C.F.R. § 224.105(c)). The proposed changes to the deviation clause are dangerous at worst, and at best impracticable and unworkable.

a. FNCs are, by definition, Areas of Restricted Navigation

The offshore FNCs already greatly impact safe navigation for large ocean-going vessels based on restricted drafts and two-way traffic. The maneuverability of large, deep-draft ocean vessels is already restricted by the depths and width in the restricted waters of FNCs, so these vessels are limited in how far they might be able to turn or alter course based on their deep drafts. The NARW vessel strike rules compound the dangers of navigating these large vessels by limiting the ability of pilots to use necessary speed to maintain safe navigation in these waters.

These entrance channels are perpendicular to the high winds and currents that are prevalent in the winter months. The perpendicular winds and currents often demand an increase in speed simply to keep these vessels on track and safely in the channel. It is in these off-shore, unsheltered, and restricted channels—with the challenging combination of strong currents, confused winds, heavy vessel traffic, and close proximity to dangerous shoal waters—where state-licensed pilots ply their trade. The Cruise Lines International Association has clearly stated in their comments NMFS proposed amendments to the speed restriction regulations that "large deep-draft vessels operating without tugs will always need to operate at a minimum speed in order to navigate safely in a channel, fairway, or Traffic Separation Scheme, based on the current weather conditions; and in most cases, this speed will be greater than 10 knots." [7]

As we have noted in numerous written comments to NMFS regarding the navigation safety deviation clause found at 50 CFR § 224.105(c), FNCs are by definition areas where a vessel's maneuverability is restricted "based on the oceanographic and hydrographic and/or meteorological conditions." Due to the rapid growth in length, width, sail area, and draft of vessels calling at U.S. ports, our concerns about the ability of pilots to safely navigate these vessels in narrow and challenging FNC waters has only increased since mandatory NARW speed restrictions began in 2008. In short, given the exponential growth of the ships calling at U.S. ports, the routine use of the navigation safety deviation clause is, out of necessity, becoming increasingly prevalent.

[7] Letter from Jennifer Williams & Maureen Hayes, Cruise Lines International Association (CLIA), Comments on NOAA's Report on Reducing Vessel Strikes on North Atlantic Whales, to Dr. Caroline Good, NOAA (Mar. 9, 2021).

b. Limits Maneuverability

The proposed changes to dramatically expand the areas SSZs along the East Coast and apply NARW speed restrictions to large vessels operating in virtually all of the FNCs along the East Coast is dangerous because it may result in hesitation by the pilot to deviate from the speed restrictions at the time when such deviations in speed are most necessary. For example, a pilot may find it necessary—to alter the vessel's "crab angle" to combat the lateral forces of the winds and currents to keep the vessel safely in the FNC—to quickly "ring up" sea speed or faster. "Crabbing" requires the pilot to increase the vessel's speed on a moment's notice and to steer the vessel into the lateral forces, such as the wind and currents, which are working to effectively push the vessel off its intended course. Often the winds and currents are perpendicular to the entrance channels in the winter months when the NARW speed restrictions are in place. A significant amount of water flow over the rudder is required to maintain these crabbing angles and, in many instances, given the size of the vessels, the only method of ensuring adequate water flow is to speed up.

Further, many of the large ocean-going vessels transiting FNCs require more than 10 knots of speed to maintain sufficient steerageway. If a pilot is forced to reduce speed, there is a need for greater rudder angle to keep the vessel on its intended course. This greater rudder angle further reduces the vessel's maneuverability which reduces the pilot ability to respond to changes in navigation conditions or other hazards, such as other vessel traffic.

Compounding the calculus of determining safe speed is that speed increases take longer for larger ships, so the notion of increasing speed on demand is impractical. Pilots must anticipate the conditions they are likely to encounter, and be prepared in advance. All of this adds up to an inherently degraded margin of safety for the safe control of ships confined to dredged channels when subject to speed restrictions.

Limiting a pilot's flexibility and ship handling options when these professionals are trying to focus on navigating a large commercial vessel in these challenging waterways would certainly jeopardize navigational safety. This is not prudent when these vessels are already operating in areas of restricted maneuverability.

Further, according to NOAA's own data, there have been no confirmed vessel strikes of NARWs in FNCs or Pilot Boarding Areas.

c. Changes to the deviation clause are also unworkable administrative burdens and threatens criminal liability for masters and pilots during a critical time for vessel safety.

NOAA's proposed changes to the navigation safety deviation clause are extremely troublesome, place an enormous administrative burden on a ship's master and pilot, and have the potential to negatively impact both the master-pilot relationship and port efficiency in challenging offshore FNCs that already restrict the maneuverability of these large vessels.

In these waters pilots must be free to build cooperative and mutually supportive relationships with vessel masters, exercise their informed independent judgment, apply their superior local knowledge, maintain operational flexibility, and have the full range of ship handling options in order to maximize navigational safety and protect the marine environment. The proposed changes to the navigation safety deviation provision threaten pilots' ability to carry out their responsibilities.

While NOAA characterizes its proposed changes as merely an "update the speed rule's safety deviation provision," there is much more to the proposal.

For example, under NMFS' proposal when the deviation clause is invoked, the vessel operator must complete and electronically submit a "Safety Deviation Report" to NMFS within 48 hours of using the deviation. The Safety Deviation Report must detail "the circumstances surrounding the deviation" and the "need for the deviation." The detailed reporting requirements are significant, lengthy, detailed, and extremely cumbersome. As explained below, there are compelling reasons why this additional administrative recordkeeping and reporting requirement is unworkable and possibly even dangerous.

First, as a practical matter, the proposed recordkeeping and reporting requirements will require considerable time to gather the information (if it, in fact, is even available in some offshore waters), compile it, fill out the form, and transmit it to NOAA. Further, if the vessel is under pilotage, "the pilot must attest to the accuracy of the information contained in the report." Even though NOAA proposes to allow 48 hours for the Safety Deviation Report to be submitted, the only practical way to comply with the rule would be for the master to complete the Report in near real time and the pilot to remain on the ship to review and "attest" to the information on the form. It is unrealistic to expect that the pilot could depart the ship to service

other ships, the ship would transit off for Europe, Africa, or South America and then the pilot and master would correspond electronically over the next two days to complete and submit the form.

These proposed burdensome reporting requirements would also be distracting at the worst possible time. Under 50 CFR §224.105(c), the deviation clause can be invoked when "oceanographic, hydrographic and/or meteorological conditions severely restrict the maneuverability of the vessel." When such conditions exist, which is routinely the case in the offshore channels along the East Coast during the winter months, the vessel's pilot and ship's master need to be focused on the navigation of the vessel and not distracted by the significant administrative burden associated with the proposed reporting scheme.

These proposed reporting requirements are not only disruptive and distracting but given how NOAA characterizes the reporting requirements in the criminal context, the requirements will have a dire impact on the dynamics of the critical Master-Pilot Relationship.

Each pilotage assignment should begin with a conference between the pilot and the master, often referred to as the Master-Pilot Exchange or MPX. The MPX is an opportunity not only to exchange information that the pilot and master each need, but also for the pilot and the master to establish an appropriate working relationship that will continue throughout the pilotage assignment. A mutually supportive and trusting relationship between the pilot and the ship's master/bridge crew is a critical component of navigation safety in pilotage waters. If this relationship is damaged or compromised, there will be negative consequences.

NOAA's proposed language for the amended deviation clause regulation overtly criminalizes decisions that must be made by vessel masters and pilots, and potentially recommendations made by pilots to vessel masters. Specifically, the proposed new regulatory language provides, "it is unlawful for any person subject to the jurisdiction of the U.S. to commit, to attempt to commit, to solicit another to commit, or to cause to be committed any speed violation with a vessel subject to the restrictions." This proposed provision would cause masters and pilots, at a critical point when they are considering whether to increase speed for the safety of the ship—and its crew, passengers, and cargo—to be worrying about whether or not their decision could subject them to criminal penalties, including imprisonment. Because the proposed regulation envisions the master and pilot agreeing upon the need to deviate from the speed limitation and concurring on all the details to be submitted in the Safety Deviation Report, a lack of understanding, hesitation, or unwillingness on the part of masters to invoke the deviation clause can create tension between the master and pilot and can negatively impact what should be a mutually supportive and cooperative relationship.

Fourth, a speed restriction imposed on pilot vessels would negatively impact merchant vessel and port efficiency up and down the East Coast.

The application of NARW speed restrictions to pilot boats will result in delays for merchant vessels waiting to get into and out of port. Frequently, a pilot boat will depart port with more than one pilot on board, transit to the pilot boarding area, deliver one pilot to an awaiting vessel, and then quickly move to deliver pilots to other vessels. In other scenarios, a pilot boat may retrieve a pilot from a vessel that has finished its transit out of port and through the offshore pilotage waters and deliver that pilot to another vessel that is awaiting a pilot for its inbound transit. These large ocean-going vessels are well-spaced for safety reasons and may be several miles or more apart. Pilot boat operations are regularly done at speeds considerably higher than 10 knots, at times in excess of 30 knots. If a pilot boat's transit to the pilot boarding areas is restricted to 10 knots or less (again, several East Coast pilot boarding areas are 10, 15 or even 20 or more miles offshore) and then this shuttling of pilots to awaiting vessels is also restricted to 10 knots, it is easy to see how ships will be delayed and port efficiency and the flow of maritime commerce will suffer—and suffer greatly.

Disruption of the flow of commercial shipping traffic into and out of ports on the East Coast also raises national security concerns since this rule will impact numerous ports that are vital to our nation's security. In fact, the Department of Transportation has identified six ports on the East Coast, (that would also be negatively impacted by the proposed amendments to the NARW vessel strike rule), as

being part of the National Port Readiness Network (NPRN).[8] The NPRN is a "cooperative designed to ensure readiness of commercial ports to support force deployment during contingencies and other national defense emergencies."[9] As discussed above, applying this speed restriction rule to pilot boats will substantially impact port efficiency, vessel traffic, and the supply chain—all factors that will negatively impact these ports readiness to support force deployments.

Use technology to better protect the North Atlantic Right Whale

APA has recommended alternative ideas to NOAA that, in our view would both maintain navigational safety and still protect the NARW. Specifically, APA recommends that NMFS establish a grant program to assist in the outfitting of pilot boats with visual and acoustic equipment designed to detect the presence of NARW and other endangered marine mammals. While such technology may not be readily available at present, such a grant program, and government incentives to produce and use these types of technology, can be a force that will drive research and development and lead to the development of these types of valuable technological tools.

APA also believes that NMFS should consider utilizing monitoring buoys to better track and locate NARWs. For instance, since these whales migrate north and south on a seasonal basis, NMFS should explore deploying monitoring buoys (similar to sonobuoys used by naval forces in anti-submarine warfare efforts), set out in an east-to-west array at various locations along the East Coast. These sonobuoy "gates" could provide valuable monitoring, tracking and migratory information to NMFS.

We also recommended that NMFS work with APA to develop an App that pilots and pilot boat crews could use to provide real-time sighting information on NARWs. As we have said in the past, pilots and pilot boats are on the water 24/7/365 and can be critical "eyes and ears" to assist NMFS in their important work of protecting endangered marine mammals, including the NARW. Such a reporting App would significantly improve NMFS' sighting data on NARWs, including location and timing. Further, the more reliable and up to date NARW location information gained by sonobuoys or reporting Apps would allow NMFS to more readily and effectively establish effective DSZs.

Conclusion

Compulsory pilotage is, at its core, all about navigation safety and protecting the maritime environment and marine life. As professionals who make their living on or near the water and who, along with their families, live and recreate along the shores, pilots have a deep concern for the health of the marine environment and marine life. I want to assure the Subcommittee that members of the American Pilots' Association are committed to working with the federal government—including with NOAA and Congress—to protect the North Atlantic Right Whale, but we must do so in a way that protects the safety of pilots and pilot boat operators and crews, ensures the safety of navigation, and, considers the detrimental impact to slowing maritime commerce on the entire Eastern Seaboard for half of the year.

QUESTIONS SUBMITTED FOR THE RECORD TO CLAY DIAMOND, DEPUTY DIRECTOR AND CHIEF COUNSEL, AMERICAN PILOTS ASSOCIATION

Mr. Diamond did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Questions Submitted by Representative Nancy Mace

Question 1. Could the imposition of these speed restrictions make it more difficult for harbor pilots to safely do their jobs?

Question 2. The Coast Guard and professional mariners raised concerns for safe navigation at slow speeds in dredged channels, and the Army Corps of Engineers has validated those concerns. Despite the success of NOAA's safe speed deviation in eliminating fatal right whale strikes and ensuring safe navigation, NOAA is still restricting speeds to ten knots, which is far too slow for ships to maintain control

[8] Department of Transportation, *National Port Readiness Network (NPRN)*, https://www.maritime.dot.gov/ports/strong-ports/national-port-readiness-network-nprn listing Charleston, SC, Hampton Roads, VA, Jacksonville, FL, Morehead City, NC, Savannah GA, and Wilmington, NC as commercial strategic seaports on the East Coast.

[9] *Id.*

within safe margins in the Charleston channel. Does the proposed rulemaking increase the probability of vessel collisions?

Question 3. You've described the pilot transfer process and how dangerous it can be. What can be done to make the transfer process safer, if anything?

Mr. BENTZ. Thank you, Mr. Diamond.

I now recognize Dr. Redfern for 5 minutes.

STATEMENT OF JESSICA REDFERN, ASSOCIATE VICE PRESIDENT OF OCEAN CONSERVATION SCIENCE, ANDERSON CABOT CENTER FOR OCEAN LIFE AT NEW ENGLAND AQUARIUM, BOSTON, MASSACHUSETTS

Dr. REDFERN. Thank you, Chairman Bentz and Ranking Member Huffman, for the opportunity to testify today. I am the Associate Vice President for Ocean Conservation Science in the Anderson Cabot Center for Ocean Life at the New England Aquarium.

The New England Aquarium is a catalyst for global change through innovative scientific research, animal conservation, education, public engagement, and advocacy for a vital and vibrant ocean.

I have used statistical models to address wildlife conservation challenges for more than 20 years, and I have published scientific papers on a broad range of topics, including species habitat modeling, vessel traffic patterns, the risk of vessels striking whales, the risk of fishing gear entangling whales, and the risk of vessel noise to whales.

On behalf of the New England Aquarium, my testimony is based on the best available science, and is consistent with the laws that protect right whales.

The right whale is one of the most endangered large whale species in the world, and is protected by U.S. laws. Specifically, the take of a right whale is prohibited under both the Endangered Species Act and the Marine Mammal Protection Act. As of 2021, there are less than 350 right whales and less than 75 reproductive females. The species recovery has been limited by lethal and sublethal effects of human activities, including vessel strikes. The annual observed human-caused mortality and serious injury to right whales from vessel strikes averaged two per year from 2015 through 2019. This average is higher than the potential biological removal for right whales, which is less than one.

The Marine Mammal Protection Act defines the potential biological removal as the maximum number of animals, not including natural mortalities, that may be removed while allowing a population to reach or maintain its optimum sustainable size. Although measures have been implemented to reduce vessel strikes, mortality and serious injury to right whales continues. This mortality and serious injury is inconsistent with the law and the best available science. Even one human-caused mortality puts the species at risk of extinction.

Right whale life history data show that the loss of each of these whales, particularly females, is compounded by the loss of their reproductive potential. For example, 1 female has given birth to 7 calves since 1982, and is responsible for at least 29 whales being

added to the population so far. This whale's contribution to the population emphasizes the effect that a single reproductive female can have on this small population.

The 2008 Vessel Strike Rule was an important step toward risk reduction. However, vessel strikes have continued since the rule was implemented, and multiple evaluations of the rule published in the scientific literature have shown that further action is needed. The proposed changes to the rule are based on the best available science, and are an essential means of taking the action required.

The scientific methodology used to develop the proposed changes is a standard for assessing vessel strike risk, has been used on the U.S. East and West Coasts, and has been incorporated in NOAA's marine mammal stock assessment reports for fin, humpback, and blue whales on the U.S. West Coast.

The changes are necessary for reducing the risk of vessel strikes. Expanding the seasonal speed zones in space and time is necessary to ensure that these zones are better aligned with right whale habitat, cover areas where previous vessel strike mortalities have been observed, and buffer against climate-driven changes in right whale habitat.

Expanding the vessels subject to the speed restriction to most vessels less than 65 feet and greater than 35 feet is necessary because at least 4 of the 13 documented lethal vessel strikes in U.S. waters since 2008 involved vessels smaller than 65 feet; 2 of these 4 strikes occurred after 2020.

Implementing mandatory dynamic speed zones is necessary because the ocean is a dynamic environment, and because over a decade of research on the U.S. East and West Coasts show low cooperation with voluntary speed restrictions.

We support NOAA's approach to determining whether, where, and for how long vessels should be subject to speed restrictions. This approach recognizes responsible use of the ocean by establishing the smallest spatial and temporal footprint needed to protect the species and incorporating the best available science. Implementation of the proposed changes to the 2008 Vessel Strike Rule as immediately as possible is an important step toward preventing the extinction of the endangered right whale. Thank you.

[The prepared statement of Dr. Redfern follows:]

PREPARED STATEMENT OF DR. JESSICA REDFERN, ASSOCIATE VICE PRESIDENT, OCEAN CONSERVATION SCIENCE, ANDERSON CABOT CENTER FOR OCEAN LIFE, NEW ENGLAND AQUARIUM

Thank you Chairman Westerman, Committee Ranking Member Grijalva, Subcommittee Chairman Bentz, and Subcommittee Ranking Member Huffman for inviting me to testify at this hearing titled "Examining the impacts of the National Oceanic and Atmospheric Administration's proposed changes to the North Atlantic Right Whale Vessel Strike Reduction Rule." I am the Associate Vice President for Ocean Conservation Science in the Anderson Cabot Center for Ocean Life at the New England Aquarium. The New England Aquarium is a catalyst for global change through innovative scientific research, commitment to marine animal conservation, education, public engagement, and effective advocacy for vital and vibrant oceans. Our mission is to conduct research on topics related to ocean conservation and to develop science-based solutions to marine conservation problems.

I have been using statistical models to address wildlife conservation challenges for more than 20 years. I studied mathematics as an undergraduate at Colorado College. I learned how to use my mathematics training to address wildlife conserva-

tion challenges during my Ph.D. research at the University of California, Berkeley. After graduating with my Ph.D., I was a National Research Council Postdoctoral Research Associate at the National Oceanic and Atmospheric Administration's (NOAA) Southwest Fisheries Science Center. I then worked as a permanent federal employee at the Southwest Fisheries Science Center for over a decade before joining the New England Aquarium in 2019. My research focuses primarily on developing cetacean-habitat models and using predictions from these models to assess risk to cetaceans. I have published numerous scientific papers on a broad range of topics, including species habitat modeling, vessel traffic patterns, the risk of vessels striking whales, the risk of fishing gear entangling whales, the risk of chronic vessel noise to baleen whales, and estimating species diversity to guide designation of marine protected areas. I am currently an associate editor for Frontiers in Marine Science, I served as a guest editor for a research topic in Frontiers in Marine Science about the impacts of shipping on marine fauna, and I serve as an invited member of numerous committees, including the International Council for the Exploration of the Sea's (ICES) Working Group on Shipping Impacts in the Marine Environment, NOAA's Rice's Whale Recovery Planning Workshop, NOAA's humpback whale critical habitat team, NOAA's second Protected Species Assessment Workshop, and the International Whaling Commission (IWC) Scientific Committee.

The Aquarium has been extensively studying North Atlantic Right Whales (NARW; *Eubalaena glacialis*) for more than 40 years. Our scientists focus on solutions-based work and our research provides the information needed to evaluate measures that can be combined to protect this endangered species. For example, we conduct spatial analyses to assess risk from vessel strikes, facilitate communication across the maritime industry to reduce vessel strikes, collaborate with fishermen on new techniques to reduce entanglements in fishing gear, collect the data and conduct analyses needed to understand and mitigate the potential impacts of offshore wind energy development, and work with lawmakers locally, nationally, and internationally to develop science-based protections for the whales. Action is needed across sectors using multiple management measures and tools to prevent the extinction of the statutorily protected NARW.

The Aquarium commends NOAA on recent regulatory steps taken to protect NARW, including the proposed changes to the North Atlantic Right Whale Vessel Strike Reduction Rule (hereafter, Proposed Rule). Our testimony focuses on the Proposed Rule because we believe that the changes in the Proposed Rule are an important component of preventing the extinction of the endangered NARW and that these changes are needed as immediately as possible. While near real-time monitoring is one of the tools that can be used to reduce vessel strikes, more work is required to determine whether it can be used to replace, rather than supplement, vessel speed restrictions. For example, Gende et al. (2019) found that opportunities to detect whales are often limited and temporary. Their study also suggests that the time delays that occur in active whale avoidance must be carefully considered, including the time needed to evaluate competing risks, determine the appropriate action to take, and achieve the new operational state after an action is taken. Finally, near real-time monitoring systems must be rigorously evaluated to quantify the vessel strike risk reduction that they can achieve, particularly in comparison to the risk reduction achieved through other methods, such as speed restrictions and vessel routing changes. The best way of combining multiple methods, such as speed restrictions and real-time monitoring, also needs to be evaluated. However, we cannot afford to wait for further progress on the development of near real-time monitoring to take action to reduce vessel strikes of NARW.

Reducing the likelihood of deaths and serious injuries to NARW from vessel strikes requires immediate, decisive, and bold action. If implemented as immediately as possible, the changes in the Proposed Rule are an essential means of taking the action required. Below, the Aquarium provides testimony on three key points about NARW and NOAA's Proposed Rule:

1. Action is needed now to prevent the extinction of NARW
2. Action is required to reduce the risk of vessels striking NARW
3. NOAA's Proposed Rule is an essential means of taking the action required

Action is needed now to prevent the extinction of NARW

One of the most endangered large whale species in the world, the NARW is protected by statutory law in the United States (U.S.). Specifically, the "take" of the NARW is generally prohibited under both the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1532(19); 16 U.S.C.

1362(13)). Although protected from hunting since 1935, the species recovery has been limited by lethal and sub-lethal effects of human activities (Corkeron et al., 2018; Sharp et al., 2019), including vessel strikes, which are the subject of the Proposed Rule. The annual observed human-caused mortality and serious injury to NARW from vessel strikes averaged 2 per year from 2015 through 2019, which is higher than the Potential Biological Removal (PBR) of 0.7 for NARW (Hayes et al., 2022). The Marine Mammal Protection Act defines PBR as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. Although measures have been implemented to reduce vessel strikes, mortality and serious injury to NARW from vessel strikes continues. The mortality and serious injury to the statutorily protected NARW from vessel strikes is inconsistent with the law and the best available science. Even one human-caused mortality puts the species at risk of extinction.

The New England Aquarium collates information on NARW mortalities and injuries from vessel strikes as curators of the North Atlantic Right Whale Consortium's photo-identification catalog. We provide this information in annual reports to NOAA (https://www.narwc.org/narw-catalog-reports.html) and in the annual report card of the Right Whale Consortium (https://darchive.mblwhoilibrary.org/browse/title?scope=3afd3800-5620-59b9-8b77-fc901b0c0fec). From 1972 through May 2023, a total of 122 cases with blunt trauma or external injuries (i.e., propeller cuts or gashes) from vessel strikes have been documented in U.S. and Canadian waters (Moore et al., 2004; Sharp et al., 2019; NOAA, 2020; NARWC, 2023; NOAA, 2023b). The evidence for these strikes include observed deaths (determined by the presence of deep propeller cuts that occurred pre-mortem and/or examining a carcass and finding evidence of blunt trauma) and sightings of living whales with cuts or gashes that are categorized as deep, shallow, or superficial. Pirotta et al. (2023) found that vessel strikes associated with deep and shallow wounds decreased a NARW's chance of survival.

The life history of every individual NARW that has been photographed is tracked in the North Atlantic Right Whale Catalog (rwcatalog.neaq.org). These life history data demonstrate the consequences of vessel strikes on the NARW population and show how the loss of each of these whales, particularly females, is compounded by the loss of their reproductive potential. Female NARW can give birth to at least 9 calves in their lifetime (Hamilton and Knowlton, 2021). For example, one whale, Wart, has given birth to seven calves since 1982 and is responsible for at least 29 whales being added to the population so far (Bishop et al., 2022). Wart's contribution to the NARW population emphasizes the effect that a single reproductive female can have on this small population and needs to be considered in the context of vessel strikes. For example, one strike resulted in the death of both a female and her dependent calf who could not survive independently. Another reproductive female, Infinity, was seriously injured in 2021 when she was struck by a 54-foot vessel; she has not been sighted again as of submission of this testimony. This vessel also struck and killed her calf. In 2020, two strikes were also documented for calves born that year: 1) a calf that was struck on two separate occasions between April and June in the Mid-Atlantic and died from the second strike; 2) a calf off the southeastern U.S. that suffered deep wounds on its head from a propeller and was unable to successfully nurse (Sharp et al., 2019; NOAA, 2020; 2023b).

NOAA also declared an Unusual Mortality Event for NARW because a particularly high number of deaths have been observed from Florida, U.S., to the Gulf of St. Lawrence, Canada, since 2017 (NOAA, 2023b). This Unusual Mortality Event remains active as of June 2023. In particular, there have been 36 deaths, 33 serious injuries (defined as likely to die), and 29 morbidity (sub-lethal injury or illness) cases documented and 92% of these cases (i.e., 90 cases) were caused by human activities.

Documented vessel strikes represent minimum numbers of strikes because not every death or injury is observed. Pace et al. (2021) showed that documented mortalities accounted for only 36% of all estimated NARW deaths between 1990 and 2017. Additionally, the lethal and sub-lethal effects of vessel strikes may be delayed. For example, one NARW suffered deep propeller wounds from a vessel strike when she was less than a year old. She survived the strike. However, when she became pregnant with her first calf at age 14, the growth of the fetus caused her wounds to reopen and she (and her unborn calf) died from a resulting infection (Glass et al., 2010).

The estimate for the number of NARW (i.e., the population size estimate) grew from 264 (+6/-4) in 1990 to a high of 481 individuals (+/-3) in 2011. As a result of the impacts to the population, the number of NARW steadily declined from the high

in 2011 to 340 individuals (+/-7) in 2021 (Pace et al., 2017; Pettis et al., 2023). This population decline has been occurring for a decade and the current population size estimate is one of the lowest in the past 20 years (Pace et al., 2017; Pettis et al., 2023). Additionally, the pool of reproductive NARW females has declined to only 72 individuals (Reed et al., 2022). This decline has been caused by a collapse in the fecundity of breeding females and a delay in when females start breeding (Reed et al., 2022), both of which have been linked to increasing levels of human impacts and changes in prey distribution. The survival of every individual NARW matters, as evidenced by the fact that the MMPA PBR is less than one (Hayes et al., 2022). Without immediate and concerted action to address the human-caused lethal and sub-lethal effects of vessel strikes on NARW, this endangered species faces a high risk of extinction.

Action is required to reduce the risk of vessels striking NARW

Reducing the risk of vessel strikes

Vessel strikes of large whales remain a conservation challenge throughout the world. For example, the International Maritime Organization (IMO) adopted nine proposals between 1997 and 2009 to reduce the risk of vessels striking large whales. The proposals focused on four whale species in three regions: NARW in U.S. and Canadian waters and fin (*Balaenoptera physalus*), sperm (*Physeter macrocephalus*), and long-finned pilot whales (*Globicephala melas*) in the Mediterranean Sea (Silber et al., 2012b). Measures used to reduce vessel-strike risk typically involve changing vessel routes and slowing vessels down. The goal of measures that change vessel routes, such as shifting the location or configuration of traffic separation schemes (i.e., shipping lanes) or establishing areas to be avoided, is to reduce the co-occurrence of whales and vessels. The goal of measures that slow vessels down is to reduce the risk of lethal vessel strikes because studies have found that the probability of a lethal strike increases with vessel speed (Vanderlaan and Taggart, 2007; Conn and Silber, 2013). Additionally, slower speeds may allow whales and vessel operators more time to engage in avoidance behavior (e.g., Vanderlaan and Taggart, 2007; Gende et al., 2019).

NOAA's 2008 Right Whale Vessel Strike Reduction Rule

In the late 1990s and early 2000s, NOAA recognized that steps were needed to address the risk of vessel strike to NARW and in 2008 they established several measures to reduce risk in a final rule to implement speed restrictions to reduce the threat of vessel collisions with NARW (hereafter, 2008 Rule; NOAA, 2008). The 2008 Rule was an important step toward risk reduction. However, multiple evaluations of the effectiveness of this rule have shown that further action is needed, and as immediately as possible, to build on that progress.

The 2008 Rule established 10 Seasonal Management Areas (active in defined areas for specific time periods) and Dynamic Management Areas (active in areas where whales are observed). Seasonal Management Areas were established where the risk of a vessel striking a NARW is expected to be higher due to whale or vessel traffic density. These areas differ in size (e.g., from approximately 1,500 to 23,000 km^2), are active during different times of year, and are implemented for different lengths of time (e.g., 2–5 months). When active, all vessels >65 feet (except vessels owned, operated by, or operated under contract to the U.S. government and law enforcement vessels engaged in enforcement or search and rescue) are required to travel at 10 knots or less in these areas. Smaller vessels are requested, but not required, to travel at 10 knots or less.

Analyses of the proximity of NARW vessel strikes to Seasonal Management Areas (Laist et al., 2014) and analyses comparing the number of NARW struck before and after management measures were implemented (NOAA, 2020) suggest that the Seasonal Management Areas have helped to reduce vessel strikes of NARW. However, multiple studies and continued vessel strikes of NARW since 2008 demonstrate that these areas fall short of achieving the risk reduction necessary to prevent extinction of NARW. In particular, multiple studies have shown that these Seasonal Management Areas are insufficient both in space and time (Schick et al., 2009; Laist et al., 2014; van der Hoop et al., 2015). The size of the Seasonal Management Areas was likely insufficient when the 2008 Rule was implemented because nearly one-third of detected NARW vessel strike mortalities occurred outside of the managed space but within managed timeframes (van der Hoop et al., 2015). Additionally, analyses of passive acoustic monitoring data collected from 2004–2014 found almost year-round habitat use of the U.S. East Coast (Davis et al., 2017).

To provide protections to NARW outside of the Seasonal Management Areas, the 2008 Rule established Dynamic Management Areas in real-time when three or more NARW are seen within close proximity. These areas remain in effect for 15 days. All mariners are encouraged to avoid these areas or reduce vessel speeds to 10 knots or less when transiting through these areas. However, these measures are voluntary and there is little cooperation with these requests to slow down (Silber et al., 2012a; NOAA, 2020). These Dynamic Management Areas have not achieved their intended goal of addressing the spatial and temporal shortcomings of the Seasonal Management Areas. Specifically, vessel strike mortalities of NARW have increased outside inactive Seasonal Management Areas (van der Hoop et al., 2015). Limited cooperation with these voluntary Dynamic Management Areas likely contributed to their lack of effectiveness (van der Hoop et al., 2015; NOAA, 2020).

Further evidence that the 2008 Rule does not provide the necessary reduction in vessel strike risk is provided by the vessel strikes of NARW that have occurred since the 2008 Rule was implemented. Specifically, from 2008 through May 2023, there were 13 documented lethal (mortalities and serious injuries) vessel strikes of NARW in the U.S. (NOAA, 2020; 2023b). Five of the 13 have occurred since 2020; at least two of these five strikes involved vessels smaller than 65 feet, which are not currently subject to the mandatory speed restrictions (NOAA, 2020; 2023b). The vessel strikes that have been observed since the 2008 Rule was implemented suggest that further action is required to ensure that this source of human caused mortality and serious injury does not exceed the level established as sustainable in U.S. laws.

NOAA's Proposed Rule is an essential means of taking the action required

Proposed Rule

In 2022, NOAA proposed changes to the 2008 Rule (hereafter, Proposed Rule; NOAA, 2022) to further reduce the likelihood of mortalities and serious injuries to NARW from vessel collisions. The proposed changes for reducing the risk of vessel strikes to the statutorily protected NARW are necessary and based on the best available science. Specifically, Garrison et al. (2022) used the most up-to-date data available about NARW distributions and vessel traffic patterns to develop an encounter risk model for the U.S. East Coast. The methodology used by Garrison et al. (2022) has become a standard for assessing vessel-strike risk for large whales and has been used on the U.S. East and West Coasts (e.g., Martin et al., 2016; Rockwood et al., 2017; Crum et al., 2019; Rockwood et al., 2020). Mortality estimates from encounter risk models developed for fin, humpback, and blue whales have been included in NOAA's marine mammal stock assessment reports (Carretta et al., 2022). Garrison et al. (2022) used the encounter risk model to estimate the reduction in NARW mortalities that could be achieved by implementing speed restrictions in broad areas along the U.S. East Coast. Their broad areas were defined as the areas of highest risk to NARW. They found an approximately 28% reduction in NARW vessel strike risk when 10 knot speed restrictions were implemented in their broad areas.

Below we address three of the four specific changes in the Proposed Rule based on the Aquarium's long-standing expertise and study of the species:

1. Expanding the spatial and temporal extent of Seasonal Speed Zones
2. Expanding the vessels subject to the speed restrictions to most vessels greater than or equal to 35 feet (10.7 m) and less than 65 feet (19.8 m)
3. Implementing mandatory speed restrictions in Dynamic Speed Zones, which are established when whales are detected outside of Seasonal Speed Zones

The fourth proposed change updates the safety deviation provisions in the 2008 Rule. We do not have expertise in this area; consequently, we do not address this change.

Expanding the Seasonal Speed Zones

The Aquarium reviewed the proposed Seasonal Speed Zones (SSZ) and associated best available science, which supports the expansion of the size of the SSZ and the length of time the SSZ are active. We support NOAA's approach to determining whether, where, and for how long speed restrictions should be in place, which recognizes responsible use of the ocean by establishing the smallest spatial and temporal footprint needed to protect the species. Vessel speed restrictions have been used to mitigate vessel-strike risk because studies (Vanderlaan and Taggart, 2007; Conn and Silber, 2013) have shown that the probability of a lethal vessel strike increases at higher vessel speeds. The SSZ, which are larger and active longer than the

Seasonal Management Areas established in the 2008 Rule, address the shortcomings identified in the 2008 Rule's Seasonal Management Areas. In particular, the spatial and temporal expansion of the SSZ ensure that they are better aligned with NARW habitat, cover areas where previous vessel strike mortalities have been detected, and buffer against climate-driven changes in NARW habitat.

U.S. East Coast waters represent year-round NARW habitat (Davis et al., 2017) and contain historic NARW feeding grounds, where water temperatures have warmed faster than most of the world's oceans (Pershing et al., 2015). As a result, NARW distributions have shifted to new areas and there have been changes in the time periods over which they use different areas (Record et al., 2019). For example, NARW have returned to historically important areas, such as southern New England shelf waters. Southern New England shelf waters were formerly a whaling ground and these waters have reemerged as an important NARW habitat (O'Brien et al., 2022). Additionally, studies have shown that climate change has resulted in the peak usage of Cape Cod Bay by NARW occurring later in the season (Pendleton et al., 2022) and in a higher abundance of NARW in Cape Cod Bay (Ganley et al., 2022). The expanded SSZ help to ensure that vessel strike risk is addressed in these areas with documented, climate-driven changes in NARW habitat use.

Additionally, the Proposed Rule will likely benefit other baleen whale species. For example, NOAA declared an Unusual Mortality Event for humpback whales because of an elevated number of humpback whale mortalities along the U.S. East Coast from Maine through Florida since 2016 (NOAA, 2023a). This Unusual Mortality Event remains active as of June 2023. A total of 198 humpback whale mortality cases through May 2023 are included in the UME, with 93% of these cases (184 cases) detected between Massachusetts and North Carolina. Determination of cause of death for recent cases is ongoing. However, half of the 20 mortality events examined from 2016 through April 2017 were attributed to vessel strikes (NOAA, 2023a). The Proposed Rule establishes a SSZ in waters off these states, which would reduce the risk of a lethal vessel strike for humpback whales.

Expanding the vessels subject to the speed restriction

The Aquarium supports the Proposed Rule's expansion of the vessels subject to the speed restriction to most vessels greater than or equal to 35 feet (10.7 m) and less than 65 feet (19.8 m). The 2008 Rule was focused on reducing risk in U.S. waters from vessels over 65 feet in size, which were the vessel sizes thought to be the main threat to NARW at that time. However, at least four of the 13 documented lethal vessel strikes in U.S. waters since 2008 (two before 2019 and two after 2020) involved vessels smaller than 65 feet, which are not subject to the mandatory speed restrictions in the 2008 Rule. Specifically, a 46-foot vessel struck a NARW off Georgia in 2012, resulting in a serious injury (NOAA, 2020). Additionally, a 39-foot vessel struck a whale off Massachusetts in 2014, resulting in propeller cuts and serious injury (NOAA, 2020). These whales could not be identified because they were not photographed; consequently, the ultimate outcome of these strikes are not known. In 2021, a reproductive female, Infinity, was seriously injured and her calf was killed when they were struck by a 54-foot vessel. Infinity was last sighted four days after the strike with deep propeller wounds to her side and has not been sighted again as of submission of this testimony (NOAA, 2023b).

Mandatory speed restrictions in Dynamic Speed Zones

Static speed management is not sufficient as a sole strategy to reduce vessel strike risk because of variability in species distributions. Consequently it is necessary to include Dynamic Speed Zones in the Proposed Rule and for speed restrictions in these Dynamic Speed Zones to be mandatory. Over a decade of research on the U.S. East and West Coasts shows low compliance with voluntary speed restrictions (e.g., McKenna et al., 2012; Silber et al., 2012a; Freedman et al., 2017; Morten et al., 2022). Consequently, alternative strategies must be used to reduce vessel speeds. Mandatory speed restrictions were found to achieve high compliance when they were implemented and enforced on the U.S. East Coast (Silber et al., 2014). This research suggests that implementing mandatory speed restrictions in areas of high risk identified using the best available science will reduce the risk of lethal vessel strikes for NARW. To ensure that the Dynamic Speed Zones provide the protection needed to reduce vessel strike risk requires the continued use of both visual sightings and acoustic detections. Both monitoring methods require sufficient effort (e.g., surveillance flights and acoustic monitoring stations) to ensure that whales are detected and Dynamic Speed Zones are established.

Conclusion

On behalf of the New England Aquarium, the above testimony is submitted as grounded in the best available science, consistent with the laws that protect the North Atlantic right whales (NARW), and necessary given the potential extinction of NARW. The Aquarium commends the National Oceanic and Atmospheric Administration (NOAA) on recent steps taken to protect NARW, including the proposed changes to its 2008 Vessel Strike Reduction Rule (Proposed Rule), which represents the bold and decisive action needed to reduce vessel strikes of NARW as one major contributor to individual deaths and the potential for the extinction of this species. The annual observed human-caused mortality and serious injury to NARW from vessel strikes averaged 2 per year from 2015 through 2019, which is higher than the Potential Biological Removal (PBR) of 0.7 for NARW (Hayes et al., 2022). Consequently, the level of vessel strikes to the statutorily protected NARW is inconsistent with the law and the best available science. Even one human-caused mortality puts the species at risk of extinction. While the 2008 Rule represented an important step in preventing vessel strikes of NARW, vessel strikes have continued since the 2008 Rule was implemented and further action is required.

NOAA's Proposed Rule is an essential means of taking the action required based on the best available science. The scientific methodology (Garrison et al., 2022) used to develop the Proposed Rule has become a standard for assessing vessel-strike risk for large whales, has been used on the U.S. East and West Coasts (e.g., Martin et al., 2016; Rockwood et al., 2017; Crum et al., 2019; Rockwood et al., 2020), and has been incorporated in NOAA's marine mammal stock assessment reports for fin, humpback, and blue whales on the U.S. West Coast (Carretta et al., 2022). Expanding the Seasonal Speed Zones in space and time is necessary to ensure that these zones are better aligned with NARW habitat (e.g., Davis et al., 2017), cover areas where previous vessel strike mortalities have been detected (e.g., van der Hoop et al., 2015), and buffer against climate-driven changes in NARW habitat (e.g., Ganley et al., 2022; O'Brien et al., 2022; Pendleton et al., 2022). Expanding the vessels subject to the speed restriction to most vessels greater than or equal to 35 feet (10.7 m) and less than 65 feet (19.8 m) is necessary because at least four of the 13 documented lethal vessel strikes in U.S. waters since 2008 (two before 2019 and two after 2020) involved vessels smaller than 65 feet (NOAA, 2020; 2023b). Implementing mandatory Dynamic Speed Zones is necessary because of variability in species distributions and over a decade of research on the U.S. East and West Coasts shows low cooperation with voluntary speed restrictions (e.g., McKenna et al., 2012; Silber et al., 2012a; Freedman et al., 2017; Morten et al., 2022). Mandatory speed restrictions were found to achieve high compliance when they were implemented and enforced on the U.S. East Coast (Silber et al., 2014). Finally, the Proposed Rule will likely benefit other baleen whale species, such as humpback whales which have been undergoing an Unusual Mortality Event since 2016 (NOAA, 2023a). We support NOAA's approach to determining whether, where, and for how long certain vessel sizes should be subject to speed restrictions. This approach recognizes responsible use of the ocean by establishing the smallest spatial and temporal footprint needed to protect the species and incorporating the best available science on the reduction of vessel strike risk. Implementation of the proposed rule as immediately as possible is an important step toward preventing the extinction of the endangered NARW.

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Mr. BENTZ. Thank you, Dr. Redfern.

I now recognize Mr. Gamboa for 5 minutes.

STATEMENT OF FRED GAMBOA, CAPTAIN, ANDREAS' TOY CHARTERS, PRINCETON, NEW JERSEY

Mr. GAMBOA. Chairman Bentz, Ranking Member Huffman, and members of the Subcommittee, it is an honor to appear before you today, and a privilege to speak to the Subcommittee on this issue.

My name is Captain Fred Gamboa, and I am the Owner-Operator of Andreas' Toy Charters, a charter boat operation based out of Point Pleasant, New Jersey. I have been in operation for 17 years, and my business consists of three boats, four licensed captains, and support crew, and I have run over 1,000 fishing trips in that time, and taken countless people fishing. I have also served as an advisor to the International Commission for the Conservation of Atlantic Tunas, ICCAT. I am committed to being an active partner in conservation management, and have a vested interest in the health and future of the recreational fishing industry and the marine resources.

Today, I will discuss how NOAA's proposed Vessel Speed Rule would impact my business, and I want to offer suggestions for a more balanced approach.

I take my customers fishing in waters adjacent to the most densely populated region of the country. We share those waters with marine mammals, including whales. And when we see one, it makes a good trip a great trip. Without well-managed and productive oceans, I don't have a job. I am committed to protecting whales, but I am also for my business. Both my livelihood and the future of my business depends on how we approach this conservation challenge.

My testimony focuses on four areas of concern with the proposed rule, as well as recommended alternatives that seek to achieve a balance on this issue.

First, safety. Vessel speed plays a crucial role in ensuring the safety of recreational boats. The boats I use for my business are center-console boats and, therefore, their usage, especially for charter trips, is limited by weather and sea conditions. As a licensed U.S. Coast Guard mariner, safety is of paramount importance in my operation. My 17-year track record speaks to this fact. Line of sight and maneuverability are optimized when my boats are on a plane which occurs well above 10 knots. Speed provides me with the ability to monitor approaching weather conditions and react by returning to the dock before conditions become hazardous.

Two, I also have concerns regarding privacy implications of NOAA's intended use of the AIS systems to enforce the Vessel Speed Rule on recreational boats. AIS is a tool to enhance safety at sea and mitigate vessel collisions, not used to enforce an unrelated statute such as Vessel Speed Rule. When my customers and I embark on recreational fishing trips, we should rightfully

possess a reasonable expectation of privacy as we enjoy our time on the water. Utilizing AIS, a navigational safety tool, for enforcement purposes undermines this expectation.

Three, a gross misrepresentation of the economic impacts of this rule is another concern. The imposition of a 10-knot vessel speed limit would render my charter trips impossible to conduct. NOAA's technical analysis of the economic impacts fail to acknowledge that I cannot take people fishing at a speed of 10 knots. It is simply not feasible. And as a result, these trips would have to be canceled. A 10-knot speed limit will result in a direct loss of over 70 trips, with an estimated economic loss of over $140,000.

Four, the last concern I would raise is the impact on access. A substantial portion of my customer base consists of individuals who do not own their own boats. If the ability to operate my boat at speeds above 10 knots is taken away, I would no longer be able to provide the public access to important and sustainable U.S. fisheries.

As a demonstration of our willingness to work with NOAA Fisheries to advance marine mammal conservation while also allowing my business to succeed, I offer in my written testimony possible solutions such as public outreach, education, collaboration with stakeholders, technology, innovative solutions, and utilization of reporting mechanisms.

The consequences of the proposed rule demand thoughtful evaluation and exploration of alternative approaches to protect our marine ecosystems, support our economy, and ensure the long-term sustainability of recreational boating and fishing through businesses like mine. I urge Congress to halt this proposal from moving forward to grant us the necessary time to develop comprehensive, effective solutions.

Thank you for affording me the opportunity to address this critical matter. I am happy to answer any questions.

[The prepared statement of Mr. Gamboa follows:]

PREPARED STATEMENT OF CAPTAIN FRED GAMBOA, OWNER/OPERATOR, ANDREAS' TOY CHARTERS

INTRODUCTION

Chairman Bentz, Ranking Member Huffman and Members of the Subcommittee, it is an honor to appear before you today and a privilege to speak to the subcommittee on the proposed rule that would limit the speed of vessels 35' and larger to 10 knots or less along the Atlantic coast for up to 7 months of the year.

My name is Captain Fred Gamboa and I am the owner and operator of Andreas' Toy Charters, a charter boat operation based out of Point Pleasant, NJ. I have been in operation for 17 years and my business consists of 3 Contender boats, 4 licensed captains and support crew. I have run over 1,000 fishing trips in that time and taken countless people fishing. I have also served as an advisor to the International Commission for the Conservation of Atlantic Tunas (ICCAT). I am a top tagging boat for the Gray's FishTag Research Northeast Striped Bass Tagging Program. I am committed to being an active partner in conservation management and have a vested interest in the health and future of the recreational fishing industry and the marine resources.

I am not an outsider speculating on how the proposed rule may impact charter boat operations like mine and many others up and down the coast. I know how I operate my business and what my customers want from a trip on one of my boats. Both my livelihood and the future of my business depend on how we approach this conservation challenge.

It is my intention today to discuss how the proposed vessel speed rule would impact my business and the public, and offer some suggestions for a more balanced

approach. It is important to note that I make my living on the water. Catching fish and bringing home something for dinner is an important part of what I do and why customers pay to go on my boat, but it is not the only reason. I take my customers fishing in waters adjacent to the most densely populated region of the country. Despite that, we fish in some of the most beautiful and productive waters. We share those waters with marine mammals including whales and when we see one, it makes a good trip a great trip. Myself and others who enjoy or make a living on the water are the true conservationists when it comes to marine resources. Without well managed and productive oceans, I don't have a job. I view this issue as one where we don't have to pick a side, boats versus whales. I am committed to protecting whales. I am also for my business and the workers I employ. The proposed rule, as written, does not accommodate those two opinions. I will propose several recommendations that seek to achieve this balance.

My testimony focuses on four areas of concern with the proposed rule.

SAFETY

Vessel speed plays a crucial role in ensuring the safety of recreational boats. While Contender builds boats that are renowned for their seaworthiness, being open boats, they are not specifically designed to operate comfortably in conditions above a strong breeze (31mph+) and a developed sea. Therefore, their usage, especially for charter trips, is limited by weather and sea conditions. Speed enables us to take advantage of favorable weather conditions and escape from inclement weather. Under the proposed rules, our boats over 35 feet would essentially be unusable for approximately seven months of the year. I simply can't cover the ground to access the targeted fisheries when limited to 10 knots. This would amount to the loss of no less than 70 trips with an estimated economic cost of $140,000.

As a licensed United States Coast Guard Mariner, safety is of paramount importance to my operation. Not only does my United States Coast Guard Mariner license require me to pass strict safety and physical training, but I also take pride in running an extremely safe operation and maintaining a loyal base of returning customers because of my safety record. Throughout my many years on the water, I have never collided with a whale. While I may not be an expert in marine mammals, spending extensive time on the water has granted me a keen understanding of the oceans and the waters in which I fish. Whales are not the sole threat on the water; there are a variety of floating objects that can cause catastrophic damage to a boat of my size, from shipping containers to floating wood debris that can easily puncture a fiberglass boat. Contrary to what the National Oceanic and Atmospheric Administration (NOAA) may believe, I can operate my vessel most safely when it is traveling at speeds above 10 knots and on a plane. My 17-year track record speaks to this fact. Line of sight and maneuverability are optimized when my boats are on a plane.

I can provide two examples where the proposed rule would compromise safety on my boats. First, speed provides me with the ability to monitor approaching weather conditions and react by returning to the dock before conditions become hazardous. Weather in New Jersey can change rapidly, and even on the clearest days, thunderstorms can develop within a few hours, posing significant risks to boaters even with informed weather forecasting. However, it would be impractical and challenging to run a business if we had to cancel trips every time there is a chance of thunderstorms. Speed allows me to avoid being caught in storms should they develop. If I observe the development of storms, I can make the decision to run at high speeds while conditions are still favorable and return to port before severe weather strikes. Likewise, I can chart a course to avoid the most intense areas of the storms. Imposing a 10-knot vessel speed restriction would strip away this ability, potentially endangering my boat, crew, and passengers. In preparation for this hearing, I reviewed the National Weather Service database and found that three out of the top five tornado outbreaks in New Jersey occurred between November 1 and May 30. Severe weather does occur often during the fall, winter, and spring months in New Jersey. Limiting my speed to 10 knots would force me to subject my boat and passengers to being caught at sea in unfavorable and dangerous weather conditions.

Secondly, speed allows me to operate my boat during ideal weather windows. I often schedule my charters to align with these favorable conditions. If my boats are restricted to a maximum speed of 10 knots, my ability to take advantage of such weather windows becomes severely limited. I would be compelled to run trips in less than desirable conditions, potentially compromising safety. Again, operating at higher speeds also allows for optimized visibility on the water and provides greater opportunity to see and avoid whales.

Enforcing such a low-speed limit would force me to prolong journeys, significantly increasing the time spent on the water. This would expose my passengers, crew, and

vessels to various other risks besides adverse weather including fatigue leading to higher risks of accidents and emergencies. Furthermore, the extended duration at sea would necessitate additional safety precautions and resources, placing a strain on the overall safety infrastructure of my business.

PRIVACY

I have concerns regarding NOAA's intended use of Automated Information Systems (AIS) to enforce the vessel speed rule on recreational boats. As a charter boat operator in the recreational fishing industry, our industry does not fall within the realm of "highly or closely regulated industries" necessitating constant government surveillance. This distinction has already been recognized by the courts, making it highly unlikely that operating a recreational boat exceeds the threshold warranting continuous NOAA surveillance for boats of certain sizes. This highlights yet another instance where the proposed rule lacks careful consideration.

AIS is internationally acknowledged by the International Maritime Organization (IMO) and domestically by the US Coast Guard as an invaluable tool for enhancing safety at sea and mitigating vessel collisions. Its intended purpose should not be compromised to enforce an unrelated statute such as the vessel speed rule. Even though my boats do not meet the criteria requiring Class A AIS, I have voluntarily equipped them with AIS to prioritize the safety of my passengers and crew and using AIS has contributed to my long-standing safety record.

Employing AIS as a means to enforce the vessel speed rule raises significant concerns regarding the protection of fourth amendment rights against warrantless searches. The courts have acknowledged the presence of "serious constitutional problems" when it comes to warrantless government surveillance and the reasonable expectation of privacy in individuals' movements. Given that charter boats do not fall under the category of highly regulated industries, we should be entitled to this expectation of privacy. The collection of time-stamped position information on individuals for enforcement purposes without a warrant constitutes unwarranted government surveillance, conflicting with the principles established in landmark cases such as Carpenter v. U.S.

When my customers and I embark on recreational fishing trips, we should rightfully possess a reasonable expectation of privacy as we enjoy our time on the water. Utilizing AIS, a navigational and safety tool, for enforcement purposes undermines this expectation.

ECONOMIC IMPACTS

In a typical offshore charter, my primary objective is to cover a substantial distance, often exceeding 200 miles. These trips are marketed as expansive and thrilling adventures, and I achieve such coverage by operating at high speeds. Unfortunately, the imposition of a 10-knot vessel speed limit would render these trips impossible to conduct.

NOAA has conducted a technical analysis, estimating the economic impacts of this rule by factoring in additional transit time for affected boats. That additional transit time would result in an average of $3,000 in economic impacts per vessel per year. However, this analysis fails to acknowledge a critical point: I cannot take people fishing at a speed of 10 knots. It is simply not feasible, and as a result, these trips would have to be canceled. NOAA did not consider the cancelation of trips in their analysis. As mentioned previously, the proposed rule would force the cancelation of the charter trips booked on my boats which would amount to $140,000 in lost income. The figures that I present are not speculation, these are actual figures based on what I charge and the number of trips that I conduct during the months that would be affected by the proposed rule. The discrepancy between my actual losses and what NOAA projects to be losses must be corrected.

Speed is not only essential for the safety of myself and my customers, but it is also what provides value to my trips. Running a trip that covers a distance of 200 miles at 10 knots would require a staggering 20 hours of run time. I must emphasize that spending such a prolonged period in an open center console boat is not safe or marketable. The repercussions would be the cancellation of these trips and a substantial loss of income.

To illustrate the gravity of the situation, I would like to highlight that two out of my three boats would become unusable from November 1 through May 30 every year. This period accounts for a minimum of 70 trips or two-thirds of my total income. However, my situation is not unique. According to NOAA, upwards of 25% of New Jersey's recreational fishing trips conducted on a boat and take place within this time frame. It is also important to recognize that the months from November to May have become increasingly more important to my business and for fishermen as peak seasons are lasting longer into the fall and starting early in the spring.

If these regulations were to be enacted, the ripple effect would be felt throughout the entire community. Local businesses heavily reliant on the influx of visitors and tourists, including restaurants, tackle shops, and hotels, would suffer a substantial decline in revenue. Consequently, the economic vitality of the entire region would be compromised, leading to job losses and a decline in the quality of life for many residents.

ACCESS

A substantial portion of my customer base consists of individuals who do not own their own boats. These individuals rely on my charter services to access the diverse fish species found off our coast. Recreational fishing holds numerous values, but one crucial aspect is its role in providing the public with sustainably caught, domestic seafood.

Allow me to focus on the impact this rule would have on fishing for highly migratory species, such as tuna. Fishing for these species constitutes a significant portion of my business. Under the current regulations, targeting or harvesting these fish is only permitted on a boat that holds an HMS Angling permit. Consequently, for individuals who do not own a boat, my charter operation represents their sole opportunity to access these important fisheries.

If the ability to operate my boat at speeds above 10 knots is taken away, I would no longer be able to provide access to the highly migratory species fisheries. This, in turn, means that a portion of the public will be excluded from benefiting from these sustainable U.S. fisheries. The consequences of such exclusion extend beyond the immediate loss of recreational opportunities; it affects the societal values of our marine resources and our ability to enjoy the benefits of sustainable, domestically sourced seafood.

In considering the proposed rule, it is crucial to recognize the significant role charter operators like myself play in facilitating public access to our marine resources. By providing the opportunity to individuals who do not own boats to participate in recreational fishing, we contribute to the broader goal of promoting sustainability, supporting local economies, and reducing reliance on imported seafood.

ALTERNATIVES

I find it unfortunate that the development of this rule occurred without any prior engagement or consultation with stakeholders within our industry, particularly considering that we are an inherently conservation-minded industry and community. Had we been given the opportunity to participate in the process, we would have gladly offered to collaborate with the NOAA to find effective ways of mitigating the risks associated with vessel strikes.

Engagement between NOAA and our industry would have allowed for a meaningful exchange of ideas and perspectives. We possess valuable expertise and insights gained from years of firsthand experience on the water. Regulating us without our input is unamerican. By working together, we could have explored various alternatives and strategies that would address the concerns at hand while ensuring the continued viability of my business.

I offer the following possible solutions as a demonstration of my willingness to work with NOAA fisheries to advance marine mammal conservation while also allowing my business to succeed.

1. Public Outreach and Education: Launch a comprehensive public outreach campaign to raise awareness among all mariners about the importance of conservation and the potential impact of vessel speeds on North Atlantic Right Whales with the intention of improving compliance with existing regulations.
2. Collaboration with Stakeholders: Foster collaboration between government agencies, charter boat operators, and the marine industry to explore and share ideas to mitigate risk of vessel strikes and other sources of mortality on North Atlantic Right Whales. This collaborative approach ensures that all perspectives are considered, and the resulting guidelines are practical, enforceable, and effective.
3. Technology and Innovation: Invest in research and development of technological solutions that can assist in monitoring and tracking whales and then push that information out to vessel operators. Public and private partnerships are the best approach.
4. Reporting and Feedback Mechanisms: Establish a user-friendly reporting system that allows boaters to report observations of North Atlantic Right

Whales. This feedback loop provides valuable data for assessing the effectiveness of conservation measures and making necessary adjustments.

As I have previously explained, the proposed rule, in its current form, would impose an overwhelming burden on my operations. Its implementation would have a crushing impact on not only my livelihood but also the clients that rely on my services. Therefore, I strongly believe that additional time is needed to thoroughly evaluate the potential impacts and explore alternative approaches that can effectively achieve conservation objectives while minimizing adverse effects on boaters and the public who cherish America's well managed fishery resources.

I firmly believe that there are alternative approaches that can effectively address the challenge at hand. The government needs to work with its people to generate sophisticated solutions to these marine mammal conservation challenges. One such approach is to harness the power of commercial innovation using a public/private partnership hackathon, which would bring together industry and government stakeholders, including not only NOAA but also the Department of Defense and other relevant agencies to work on innovative solutions together.

By pooling our collective resources and expertise, we can foster an environment of collaboration and creativity to develop solutions that protect endangered whales while minimizing adverse impacts on boaters. This is not a binary problem where we must choose one side over the other.

In conclusion, I urge you to recognize the gravity of this issue and grant us the necessary time to develop comprehensive solutions. The consequences of the proposed rule demand thoughtful evaluation and exploration of alternative approaches. By doing so, we can protect our marine ecosystems, support our economy, and ensure the long-term sustainability of recreational boating and fishing through businesses like mine.

Thank you for affording me the opportunity to address this critical matter. I am happy to answer any questions.

Mr. BENTZ. Thank you, Mr. Gamboa. I thank the witnesses for their testimony. I will now recognize Members for 5 minutes of questions. We will begin with Representative Wittman.

Mr. WITTMAN. Thank you, Mr. Chairman. I would like to thank our witnesses for joining us today.

Dr. Redfern, I would like to start with you. Going to the New England Aquarium website, I want to read this. It says, "Large whales do not have many predators, and predation was not previously thought to be a serious threat to right whales. However, four cases of such attacks, three resulting in death and one bite mark on a live calf are detailed in an article recently published in Marine Mammal Science: 'Shark Predation on North Atlantic Right Whales in the Southeastern United States Calving Grounds'."

Do you acknowledge that there are whale deaths of right whales from predation from orcas and white sharks? Yes or no.

Dr. REDFERN. I have not studied that issue. What I have focused on is human mortalities.

Mr. WITTMAN. Will you acknowledge that this scientific journal study that was quoted on your website is correct?

Dr. REDFERN. I am just saying I haven't read that article.

Mr. WITTMAN. You haven't read it. Are you saying that you don't believe it is true?

Dr. REDFERN. No, I am not saying that. If it has been published, it has gone through the peer review process, and should stand as best available science, and I clearly should go and check that out.

Mr. WITTMAN. Do you acknowledge that there are deaths from non-anthropogenic causes?

Dr. REDFERN. What is important is that the——

Mr. WITTMAN. Do you acknowledge——

Dr. REDFERN. Yes, there can be sources from that, but the Marine Mammal Protection——

Mr. WITTMAN. Thank you. All right, Administrator Coit, I would like to go to you.

As you look at this and your projection of mortality from right whales, your projection is that 100 percent of mortalities are from ship strikes and gear entanglements. Is that correct?

Ms. COIT. Thank you for the question. The predation that you referred to, I believe, affects calves when they are small.

Mr. WITTMAN. Are calves also right whales?

Ms. COIT. Yes, they are, and they are the ones subject to predation.

Mr. WITTMAN. OK, thank you, let me go to my question.

You are projecting that 100 percent of mortality from right whales, calves, youth, mature whales, are 100 percent from anthropogenic causes.

Ms. COIT. We are projecting that 100 percent of adult whale mortalities are from anthropogenic——

Mr. WITTMAN. You are talking about the total population of right whales, though, correct?

And we just heard some very compelling testimony about how incredibly important the young whales that are produced by the females are to the total population. So, if you have a reduction in a young calf, is that not also impactful on right whale populations?

Ms. COIT. Yes, sir, it is. And until those calves reach one year of age, they sort of linger on the outside of our population estimates because the odds of them growing up——

Mr. WITTMAN. So, if we are looking at managing right whale populations, and we completely discount natural predation as a cause of death for the total population, is that not unfair in how we actually look at managing it?

And I want to ask this question, too: Has NOAA completed the 5-year study it is supposed to be doing on the impacts on right whale populations?

Ms. COIT. Thank you. Are you talking about our stock assessment report?

Mr. WITTMAN. Yes.

Ms. COIT. I need to double check on that. I believe we recently completed——

Mr. WITTMAN. Yes, I don't think it has been completed yet. So, we are going down the rulemaking path to create a rule before we fully understand the population dynamics and all of the aspects that affect right whale populations, including non-anthropogenic causes of mortality. You are making an assumption that 100 percent of mortality is due to human impact. We see that is not indeed the case, or even scientific journal articles that say that that is indeed the case. So, you are going down the road of policy.

Under rulemaking from NOAA, can you give me an example where, based upon public input, you have either stopped a regulatory process or made significant changes to a regulatory process based on input such as what you have heard today? Yes or no.

Ms. COIT. Thank you again for the question. I can tell you that we consider the public input, and make changes to the rules based on that——

Mr. WITTMAN. Have you made a change to a regulation or stopped a regulation due to public input?

Ms. COIT. Recently, the 2021 rules for the fishing industry in regard to right whales, we took public input on aspects of that and changed the proposed rule. So, that would be an example.

Mr. WITTMAN. OK. So then, in this instance, would you take into consideration the impact that this will have on coastal communities?

I want to speak on behalf of recreational and commercial fishermen in the Virginia and Carolina areas. When you are talking about a 90-mile range, 10 knots of limitation in speed, and a charter boat that has a 10-hour charter that now is going to take 9 hours to get to the fishing grounds where they fish 90 miles offshore, would you acknowledge that that would have an impact on that industry?

Ms. COIT. Yes, I would acknowledge both the impact and the importance of those industries, and that we received many, many comments on these issues that we are considering now at NOAA.

Mr. WITTMAN. Thank you, Mr. Chairman. I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Ranking Member Huffman for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman.

And Ms. Coit, we have heard a lot of information from Members of Congress here and some of the witnesses that seems to differ from what I have read. I have read, for example, that we have had in the last 3 years four vessel strikes causing death and serious injury to right whales from smaller vehicles. Is that your understanding of the data?

Ms. COIT. Thank you for the question. Yes, that is correct. We have had 14 lethal strikes since we issued the rule in 2008, at least 5 of which are from vessels less than 65 feet. And from June 2020 to August 2022, when we proposed the rule, we have documented an additional 4 lethal whale strikes, of which 3 involved unregulated vessels less than 65 feet.

Mr. HUFFMAN. Thank you for that. And, again, nobody wants to inconvenience boaters in any way. But Ms. Coit, NOAA is required—I would really appreciate it if our colleagues, you get your time, I get my time. I didn't interrupt you.

VOICE. I am just making a comment. Not to you.

Mr. HUFFMAN. Yes. I would also like a little extra time for the interruption.

Mr. BENTZ. You will get it. Go ahead.

Mr. HUFFMAN. Thank you. So, Ms. Coit, you are required by law to take action, given the threat of extinction to the North Atlantic right whale under the current facts, right? I mean, this is not something where you can just, as some witnesses have said, give us a little more time, give us a few more years to try to figure out other alternatives. Talk about why you have very limited discretion in this situation.

Ms. COIT. Thank you for the question. As you know, Congress vested in NOAA the authority and the requirement that we implement the Endangered Species Act and the Marine Mammal Protection Act, and that we prevent extinction and recover listed species.

Given the known causes of mortality for right whales and their critically endangered status, we have to take action to reduce the risk from vessel strikes if we are to prevent what now is up to 30 mortalities per year from vessel strikes and entanglements. So, we really have no choice if we are going to prevent extinction than doing more.

Mr. HUFFMAN. And we have tried for years to have a more dynamic type of restriction, more of a real-time, flexible system. How has that been working?

Ms. COIT. I think we have high hopes for improving technology. But right at this moment we don't have existing technology that can track and monitor and detect and avoid vessel strikes sufficient to prevent the fatalities.

Mr. HUFFMAN. Yes, I think all of us would love to see that technology come online, and maybe give you some tools that might be a little bit less restrictive. Is there any reason that, if that technology ripened and became a viable alternative, you couldn't revisit the rule?

Ms. COIT. Thank you. We will be pleased to revisit the rule if we had better technological solutions to prevent the risk to right whales.

Mr. HUFFMAN. All right, thank you.

Dr. Redfern, you have been providing some clarity and scientific grounding to the impact of vessel strikes on North Atlantic right whales. In your opinion, are NOAA's models based on the best available science, and supported by independent research studies?

Dr. REDFERN. They are. The methods that NOAA used when they were looking at the proposed changes have become a standard for assessing vessel strike risk. I think it is important to note that mortality estimates from this methodology are incorporated in NOAA's annual marine mammal stock assessment reports for fin, blue, and humpback whales on the U.S. West Coast.

I also want to highlight, though, that we know models make assumptions. One thing I think it is really important to note that NOAA did when they were drawing their seasonal areas, they used the predictions from the models, but then they cross-validated those against where right whales had been seen. And they used more data than were incorporated in the model. They used acoustic detections, they used opportunistic sightings. So, they really did what they could to pull in all the best available data and make sure that those speed zones represented areas where right whales occurred.

Mr. HUFFMAN. All right, thank you. And could you speak to why vessel strikes are an especially important consideration when it comes to females and calves, which is, I think everybody understands, critically important if we are going to recover the population?

Dr. REDFERN. Yes, females and calves are particularly vulnerable because they are spending time resting at the surface, and that is where they are going to be at greatest risk of strike, as well, as I mentioned in my testimony, females have this incredible reproductive potential. They are what are extending the population. That one whale had contributed 29 offspring and grandchildren to

this population. It is what gives me hope. If we can stop killing them, they can come back, and we can prevent their extinction.

Mr. HUFFMAN. Thank you.

And Mr. Hugelmeyer, last question. I understand that you don't like this Vessel Speed Rule applied to smaller boats, but we have data suggesting smaller boats do occasionally present a threat to right whales, especially females and calves. Is there any speed reduction for the smaller vessels that we are talking about, or is it your view on behalf of the industry that they should just be completely exempted and left alone?

Mr. HUGELMEYER. Thank you for that question. Two points: One, I don't believe that the risk assessments are accurate. NOAA has it wrong on the economics, they have it wrong on the number of vessels, they have it wrong on the nature and the engineering of the vessels——

Mr. HUFFMAN. OK, but to my question, is it your position that there should be just a complete exemption of these boats, or is there any speed restriction that you could live with on behalf of the industry?

Mr. HUGELMEYER. It has to do with safety. The way the——

Mr. HUFFMAN. So, what is the speed?

Mr. BENTZ. I am sorry——

Mr. HUFFMAN. What is the speed?

Mr. BENTZ. We are done. Next, the Chair recognizes Mr. LaMalfa for 5 minutes.

Mr. LAMALFA. Thank you, Mr. Chairman.

Mr. Gamboa, I didn't quite catch, what are the size of your vessels?

Mr. GAMBOA. I have a 39-footer and a 44-footer.

Mr. LAMALFA. So, you are right in that small range.

Mr. GAMBOA. Correct.

Mr. LAMALFA. OK. And what is the draft on them? Is this poster behind me pretty accurate?

Mr. GAMBOA. I am 2 feet on the 39, and 3 feet on the 44-footer.

Mr. LAMALFA. So, the bottom of the prop only sticks down 2 to 3 feet, right?

Mr. GAMBOA. Correct.

Mr. LAMALFA. OK. And what is the speed you would go the fastest when you are out there doing your thing?

Mr. GAMBOA. It all depends on what I am doing, conditions of the sea——

Mr. LAMALFA. Well, for any activities: showing off, racing, whatever.

Mr. GAMBOA. From 40 to 70 miles per hour. My top end is 72 miles per hour.

Mr. LAMALFA. And what is typical for cruising?

Mr. GAMBOA. Thirty to forty, cruising.

Mr. LAMALFA. Thirty to forty? OK. And do you have any fish spotting equipment on there?

Mr. GAMBOA. Well, besides tower and visual, we have binoculars that stabilize at sea. So, we have a 7-mile radius.

Mr. LAMALFA. And do you have folks that are spotting obstacles, including whales?

Mr. GAMBOA. Absolutely.

Mr. LAMALFA. All right.

Mr. GAMBOA. Because there are a lot of other potential factors involved: submerged shipping containers, all kinds of stuff on the surface that we want to avoid besides whales.

Mr. LAMALFA. OK. So, it is said in my notes here, and I think it was in testimony, as well, that the odds of a boat that size hitting a whale is about one in a million. Does that seem——

Mr. GAMBOA. Pretty much, pretty much.

Mr. LAMALFA. And nobody wants this stuff to happen.

Mr. GAMBOA. I have to tell you. To be part of this life, we have a symbiotic relationship with whales. We need the whales. I need them to find fish. They help me find the tuna. There are certain ways that these things travel in the water, and they are very easy to predict, especially when they are around the prey species that we are looking for.

Mr. LAMALFA. Do people in your line of work do much night work, or is it primarily——

Mr. GAMBOA. Mostly daytime.

Mr. LAMALFA. Is there a greater threat of hitting a whale at night or day?

Mr. GAMBOA. We don't travel at night at those speeds, so it is mostly daytime for us.

Mr. LAMALFA. OK. For Administrator Coit, having heard what has been talked about here today a little bit, do you believe that the people from industry—in other words, the pilots, the recreation, whatever—that they have legitimate concerns, don't you think, when we are talking about, again, look at what we saw here on the small draft on the smaller boats. They have a legitimate concern that the rule is kind of maybe a little wide-ranging, wouldn't you think?

Ms. COIT. Thank you for that comment and question. Certainly, my experience has been that the recreational boating community and the charter boat captains truly appreciate the wonder of nature and whales, and I completely believe that we all want to work together to protect whales.

These issues that have been raised are really difficult issues. And, yes, I do think that they are consequential. And there are things that we are considering as part of the input that we got on the proposed rule.

Mr. LAMALFA. Mr. Diamond, what are the typical speeds of the larger vessels above 65 or the biggest ships we are talking about? What is their normal speed that they are being subject to the 10-knot rule?

Mr. DIAMOND. Thank you, sir. It would certainly depend on the size of the vessel, and the wind, and which particular channel.

But, generally, as they are coming in these federally improved offshore navigation channels, which is what I was referring to, the ships that I am talking about that are being piloted aren't transiting up and down the East Coast. The ones that we are mostly focused on are the large vessels that are moving in and out of the federally improved, dredged channels. So, the speeds there would be anywhere from 15 to 17 knots, perhaps faster, perhaps slower.

Mr. LAMALFA. So, we are talking a reduction in speed of no more than half, right?

Mr. DIAMOND. It is a significant change, because that drop from, say, 15 or 16 knots to 9 knots would dramatically influence the ability——

Mr. LAMALFA. But when you are out in an ocean-going area, you are still going about 17 knots. Is that about the most——

Mr. DIAMOND. In a complete open ocean area, going much faster than that, up to 30 knots, perhaps.

Mr. LAMALFA. Up to 30? All right. What is the situation you could live with here? Just give me a recipe for—you know, there is great concern here, legitimate concerns. What would be your recipe?

I want to bring in that there is the whale safe alert process they have in the San Francisco Bay, which seems to be working pretty good with that technology. Is that technology part of the thought? What would be your prescription for how we could do better here?

Mr. DIAMOND. Yes, sir. There would be three things that we have specifically recommended to NOAA over and over again, including in writing.

One would be to better utilize technology. And we have offered pilot boats to test this whale detection technology. Pilot boats are on the water 24/7/365 days a year. These are the perfect eyes and ears on the water to help detect this. And we have offered that up.

But the other two things that we have suggested are the Federal navigation channels, which I am referring to, are these critical strategic and economically important channels into and out of East Coast ports. If you exempted all of those channels from the speed restriction—which, again, there has never been, according to NOAA data, a strike in these channels—it would represent 0.002 of 1 percent of the entire area. So, if you exempted the channels, ships would be free to maneuver as safety required, and it wouldn't be a threat to the right whale.

Similarly, we have asked them to exempt pilot boats from the rule. And, again, these are operated by professional mariners, the best small boat handlers in the world. And they have lookouts, and there has never been a strike by a pilot boat.

Mr. BENTZ. Thank you.

Mr. LAMALFA. Thank you, Mr. Chairman. I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Mrs. Peltola for 5 minutes.

Mrs. PELTOLA. Thank you, Mr. Chairman. My questions are for Deputy Administrator Coit.

Thank you for your testimony today. Like all of my colleagues, I support protecting endangered wildlife. But I am very concerned about the proposed rule limiting vessel speeds, which could cause severe unintended consequences, especially in Alaska, if they are adopted on a broad basis. Alaska is very dependent on fishing and tourism, with many small charter operators whose operations can be disrupted by slower or unclear speed limits.

I really appreciated what Commander Diamond was talking about in terms of safety. When you are out in the tides, and currents, and winds, you really have to have some amount of speed in order to maintain control of your vessel.

I am just wondering, Deputy Coit, if NOAA intends to apply these speed limiting standards to other species or regions of the Pacific.

Right now, we have a lawsuit regarding orcas in Washington that is affecting our trollers in Sitka in southeast Alaska. So, I am concerned about this trend, and I am wondering if you are considering applying it to other places in the United States.

Ms. COIT. Thank you for that question. And I do believe I met you first in this very hearing room.

Mrs. PELTOLA. Déjà vu, yes.

Ms. COIT. This rule is specific to North Atlantic right whales, and it regards their protection and what is needed to do to reduce risk to them. It doesn't affect the Pacific Coast. There are no speed restrictions outside of Glacier Bay National Park in Alaskan waters. And this rule in our current consideration doesn't apply to Alaska.

I would like to add that mariners' safety is, of course, a top priority. And we have included in this rule in the Atlantic Coast some expansion, and have had fruitful conversations with the Pilots Association and others, but want to just agree with all that that is a top priority.

Mrs. PELTOLA. All right. And just as a follow-up question, Mr. Chairman, if I may, could you provide more detail on how marine businesses and particularly shipping companies and charter fishing operators have been consulted on the proposed rules, and how they would be included in any further regulatory development?

Ms. COIT. Thank you for the question. It is important to note that in January 2021, NOAA released for public comment an assessment and a comprehensive report that talked about the need to align the areas where speeds were being reduced with where the whales are and are likely to be. And it talked about the lethal impact from smaller vessels going at high speeds. So, that document was released, and we received 20,000 comments on that. And that informed this rule.

When this proposed rule was released, we have had many conversations and meetings, presentations, including with the folks in this room throughout the comment period. At this point the comment period is closed, and we are reviewing all of that input.

Mrs. PELTOLA. OK. And I guess I would just ask Mr. Hugelmeyer if you felt the comment period was extensive or inclusive.

Mr. HUGELMEYER. Not at all. We were not engaged whatsoever. We were taken by surprise. As the community that is having the biggest impact, and being asked to take on the biggest burden here, and to not have been communicated with at all, and then in arrears, and before the comment period we were told we couldn't talk because we are about to issue, and then after we couldn't talk because we are in now the comment period, it has been, to be quite honest, not the way we have been working with NOAA historically, and we are shocked.

And as far as the expansion of these rules, we fear that same threat that you do. There is already a petition for NOAA to expand this across the entire Gulf of Mexico. And we see this as a campaign to remove boaters and boating around major sea areas around the country, and we expect it to metastasize to the Pacific.

So, right now there are groups trying to petition NOAA, as we speak right now, on this issue to move it to the Gulf.

Mrs. PELTOLA. Thank you, Mr. Chairman.

Mr. BENTZ. Thank you, Mrs. Peltola. The Chair recognizes Mr. Graves for 5 minutes.

Mr. GRAVES. Thank you, Mr. Chairman. I want to thank the witnesses for being here today. I appreciate you all being here.

This weekend I actually had a chance to go out fishing for the first time in a while. And you all can admire my nice legs for just a minute.

[Slide.]

Mr. GRAVES. But, yes, these are called red snapper, Jerry. I know you all don't know how to catch these in Alabama.

[Laughter.]

Mr. GRAVES. But Madam Administrator, we were about 80 miles off, all right? We were about 80 miles offshore. And according to my math, which there is an excellent chance I am wrong, but it would take me about 7 hours to get out to this spot going at 10 knots, which is very concerning.

And the reality in a situation like that is that what is going to happen is that most boaters aren't going to go. I will tell you I wouldn't have gone out. In fact, there was weather that was over to our west that was moving in. There was not a chance I would have gone out, which has an impact on the number of folks who go out boating, it would have an impact on the economy, on tourism, bait shops, hotels, and everything else that happens.

[Slide.]

Mr. GRAVES. So, look, here is my concern. My concern is that you had people who put this thing together that are not boaters, they are not in a boat, not on a boat, and don't understand this issue.

[Slide.]

Mr. GRAVES. The reality is that, even when you go through—and I can take some other NOAA data that, unfortunately, I am incredibly familiar with, Saffir-Simpson Scale, a scale that NOAA puts together that rates the wind speed of hurricanes 1 through 5. Of course, you also have tropical storms and tropical depressions.

I know, from being out there in the water, that some of the wind speeds that are contemplated in the rule, they do not reflect boating reality. I have been out in wind speeds of 10 miles an hour, where we have had 5-foot swells, 6-foot swells, and greater that I would not ever, ever recommend that anybody go ride 10 knots because it is just unsafe. It is unsafe to be in those types of conditions.

Now, we have talked about some solutions because I think I can speak for everybody here that there is no one on this Committee that wants to go out there and trash whale populations. There is no one. But what we want to do is we want to find realistic solutions.

[Slide.]

Mr. GRAVES. Now, this right here, the red up there actually shows where there are whales. So, you can see the right whale. In fact, you know what? Actually, you probably can't see the right whale. Let me point it out to you. It is right there, all right? That is the right whale. Everything else is boat traffic. So, effectively,

what you are doing under your proposed rule is you are telling everybody in the blue, the boat traffic, that they have to stop, or that they have to go 10 knots whenever the whale is up there.

Look, this is 2023. We can do better than this. And as a matter of fact, we actually have.

[Slide.]

Mr. GRAVES. There are technologies that exist today, we have done it with sharks, where we do real-time monitoring.

Let me let me say it again. There is no one on this Committee that wants to go out there and trash an endangered species. But I think what we need to be doing is looking at more realistic compliance opportunities, and I think technology provides a good one.

I understand from the IRA you have programmed some dollars into some type of monitoring. Is that real-time monitoring?

[Nonverbal response.]

Mr. GRAVES. It is. So, does something like we have done with sharks, is that a proposed solution here or a possible solution here?

Ms. COIT. Thank you, Congressman. I really appreciate your perspective. And, yes, I think we are planning to put more——

Mr. GRAVES. And you can give accolades to my red snapper catch, too, if you want to.

[Laughter.]

Ms. COIT. We are planning to put $82 million of our IRA money into right whale mitigation and monitoring, including using funds to expand the near-real-time monitoring systems that we have.

Right now, there is an app and a whale-safe map where we record all sightings, and we work with aerial passive acoustic monitoring, and there are some other technologies we are talking to NASA and MITRE about with the use of radar and infrared. So, I think there is an opportunity in the future to really know where the whales are and have avoidance technology.

Mr. GRAVES. Got it. And that would fundamentally change the structure of the rule.

[Slide.]

Mr. GRAVES. Look, the last thing I have, and there are different versions of this one, but you have to look at the draft of these vessels. This is, I think, a 37-foot center console over there. The thing is pulling 2 feet of draft. And I think that even a cabin cruiser here—what is this, a Freeman or whatever that is going—that one has about 4 feet of draft. So, to treat every vessel as though it is a deep draft post-Panamax, that is just not reality.

I am over time, so let me just say this. I think it is really important that you engage the private boating community to understand the characteristics and how they would respond to a proposed rule like that. Real-time monitoring is the right approach.

I apologize, Mr. Chairman, and yield back.

Mr. BENTZ. Thank you, Mr. Graves. The Chair recognizes Mr. Magaziner for 5 minutes.

Mr. MAGAZINER. Thank you, Chairman.

NOAA has a vital role to play in protecting endangered species like the North Atlantic right whale, while also crafting regulations that will minimize the impact on the industries that Americans in coastal communities rely on for their livelihoods.

And I just want to say to the Administrator and to everyone in her office, I don't envy the work that you have to do. It is a challenging thing to craft a rule that will save this endangered species, but also protect maritime industries. It is not an easy thing to do.

And I want to thank Mr. Hugelmeyer, Mr. Diamond, Mr. Gamboa for your work, as well. You are doing a good job advocating for your industries, for the people who are employed by them, and this is exactly the way the process should work.

What I am perplexed by, though, is that we are having a hearing on a rule that hasn't even been finalized yet. So, the way this works is an agency comes out with a draft rule. There is a public comment period where stakeholders have the opportunity to provide input. The agency looks at that feedback and incorporates it into a final rule. Correct me if I am wrong, but where we are in this process is the comment period has just closed, the agency is still evaluating the comments that have been submitted, and the final rule hasn't even come out yet.

So, we are here talking about a rule that none of us have actually seen, and we have the ability, through the Congressional Review Act, and I know that my colleagues are familiar with this because we have been doing it a lot lately, to vote to overturn rules after they are finalized. But that is not where we are in the process yet.

So, I just once again remind everyone the conversations we are having here are important. The stakeholder feedback is important. It is important that we find the right balance between protecting maritime life, endangered species, and also protecting key industries that employ our constituents. But we are putting the cart before the horse here, in my opinion, evaluating a rule that none of us have seen the final version of. We have seen a draft before the public comments have been incorporated and evaluated.

Administrator Coit, I just want to make sure that I understand the process here. Am I correct that your agency is still evaluating the public comments that you have received to develop the rule that we are discussing today?

Ms. COIT. Thank you, Congressman. Yes, that is correct. We are evaluating the 90,000 comments, and the comment period is closed, and we are in that deliberative process right now.

Mr. MAGAZINER. Right. So, again, with respect, members of this Committee are getting worked up about a rule that none of us have seen, that hasn't actually been written or finalized yet.

Is it your intention, though, Administrator, to implement a rule that will save the North Atlantic right whale from extinction, but also at the same time impact coastal industries as minimally as possible? Is that the balance that you and your staff are trying to achieve?

Ms. COIT. Thank you. Yes, that is the balance that we are trying to achieve. And we also put out for public comment the economic assessment, and got a lot of good comments on that, too.

Mr. MAGAZINER. Thank you.

I also just want to flag we are now heading into appropriations season, and your agency, along with all of the others across the Federal Government, are being evaluated for appropriations. Can you speak to the importance of adequate staffing levels in

developing rules like this, and in making sure that the public comments and the feedback that you receive from impacted industries and stakeholders are adequately represented and considered in the final rulemaking process?

I think it is important that everyone in this Congress understand the importance of staffing for your agency so that you can do this work.

Ms. COIT. Thank you, Congressman. Yes, that is right. We have a tremendous workload around endangered species and fisheries, and staffing is needed to carry that out. As you might have heard, we are taking some of the funding from the Inflation Reduction Act to devote to this important issue. And the National Defense Authorization Act, new authorities where we didn't get any funding, we are also working to do our best to follow through with those, as well.

Mr. MAGAZINER. Yes. So, listen, this is an important issue. But, again, I am just sort of perplexed by the timing here.

This seems to be our week for trying to overturn rules before we have even seen them. On the Floor this week, we are going to be considering rules that the Administration is developing to limit gas leaks in home appliances. But, once again, our colleagues across the aisle are trying to overturn these rules before they have even been written, before they have even seen them. And here, once again, we are having a hearing on a rule that no one has actually seen. It is disappointing, I think, that my colleagues across the aisle are so eager to overturn anything the Biden administration does that they do it before they even see it. And I would just suggest that this conversation, while very important, is premature.

Thank you. With that, I yield back.

Mr. BENTZ. Thank you, Mr. Magaziner. The Chair recognizes Chairman Westerman for 5 minutes.

Mr. WESTERMAN. Thank you, Chairman Bentz. Thank you to the witnesses.

Mr. Hugelmeyer, you said in your testimony that NOAA's proposed rule is not supported by international research, and I think Mr. Garret's research is probably more in depth than the technical basis for NOAA's proposed rule. But can you speak to the research findings you were referring to?

Mr. HUGELMEYER. Yes. The Tethys Research Institute in Italy, which has actually conducted extensive research on ship traffic, high-density ship traffic in relation to both sperm and fin whales, they are looking at how can they use technology to monitor the whales to keep their endangered species from being impacted, while also continuing to keep their very strong recreational market. It is one of the most dense recreational markets in the world in that Italian Riviera region.

They have found that the majority of whale strikes come from boats over 260 feet. And I think this is a key piece, because small recreational boats are being conflated very intentionally in a lot of the language in press, in stories, in visuals. This is the depth of a recreational boat. It is the length of my arm. The depth of the boats we are being compared to are twice the height of this ceiling. That just isn't an accurate conflation.

So, when you take all of your data and assumptions and inputs, and you are comparing our segment of the industry with the wrong engineering data, and this is all part of your modeling of the risk assessment, your risk assessment is off because it is not in the same planet at all. And that is really why looking at external research groups like Tethys and what they have been finding, there are some real lessons that we can adopt in the United States.

And technology is definitely the solution, I agree with Representative Graves.

Mr. WESTERMAN. And Deputy Administrator, would you like to comment on how substantive NOAA's research is compared to the research that Mr. Hugelmeyer was talking about?

Ms. COIT. Thank you for the opportunity and the question.

What makes right whales so vulnerable is they spend so much time on the surface or just below the surface, so blunt force trauma from vessels hitting them directly is one if the major causes.

Mr. WESTERMAN. Do you have documented cases of these small vessels hitting these whales?

Ms. COIT. We do have documented cases. I could give you some examples, or I could send it to you.

But I think we have a lot of good information, and are using that information to update our science. But we are working internationally on the best available science.

And it is both. It is not just the running over the propellers, but it is the direct hits, the blunt force trauma that is killing a lot of the whales. And, in fact, of the 45 whales that have been stranded on the Atlantic Coast and died this year that we have been able to do necropsies, that blunt force trauma from vessel strikes is the major cause of the mortality.

Mr. WESTERMAN. Do you know which vessels were striking them?

Ms. COIT. Sometimes we do and sometimes we don't.

Mr. WESTERMAN. How much can you quantify "sometimes"? Like, 5 percent, 10 percent?

Ms. COIT. Yes, the scientists believe that one-third of the time we get reported documented cases, and two-thirds of the time, as you said, like, with a great, big ocean-going vessel, they wouldn't even know they struck a whale.

Mr. WESTERMAN. Mr. Diamond, your organization provided written comments to NOAA's June 2020 Vessel Rule Assessment, and the assessment made several recommendations that were included in the proposed rule, such as expansion of the management areas and expanding the speed restrictions to small vessels. APA's comments raised similar concerns to the testimony you provided today.

Did NOAA engage with APA when it provided comments to Vessel Speed Rule Assessment?

Mr. DIAMOND. When the assessment was published in 2020, and we submitted our comments, we had one phone call with them. But we certainly didn't hear from NOAA at all during the publishing of this prior to, during, or after the publishing of this rule that we are discussing today.

Mr. WESTERMAN. All right. Ms. Coit, you talked about using Inflation Reduction Act funds to hire more people. Can you explain how in the world using taxpayer money to hire more people from

an administrative agency that is proposing unreasonable restrictions on economic growth will help reduce inflation? How do you justify that?

Ms. COIT. Thank you for that question. Some of the things that we are talking about in regard to our responsibility to conserve biodiversity, which you talked about eloquently in your opening remarks, and the acceleration of new technologies, those are things that we need expertise to work on. So, I think, in terms of accomplishing our mission, we need the people and the experts to do that work.

Mr. WESTERMAN. So, spending more money on the Administration attacking the private sector is going to somehow reduce inflation would be your justification for using IRA dollars?

Ms. COIT. We are looking to use IRA dollars on the top-priority issues under NOAA's authority.

Mr. WESTERMAN. I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Mr. Webster for 5 minutes.

Mr. WEBSTER. Thank you, Mr. Chairman.

Mr. Diamond, I think you mentioned in your testimony that, I believe it was over a 15-year period, there was one right whale that was killed. Is that true?

Mr. DIAMOND. I believe that statistic may have come from Mr. Hugelmeyer. But from what our written testimony was, we made the point that within the navigation channels on the East Coast, NOAA's data show there has never been a ship strike in these federally improved navigation channels, zero.

Mr. WEBSTER. So, what is the size boat you are talking about?

Mr. DIAMOND. Well, we have had issue with this rule in two perspectives.

One, by lowering the application of the rule from 65 feet to 35 feet, it is going to capture all of the offshore pilot boats on the entire East Coast. These are purpose-built vessels that are meant for high speed to shuttle pilots 20 or 25 miles offshore to get aboard a commercial ship to bring it in. So, it is not feasible to do those operations. It is unsafe to do those operations at less than 10 knots. It is also unsafe to go that far offshore in the winter months on vessels smaller than 35 feet.

But this rule also impacts the navigation safety of large commercial cargo ships coming into and out of port. So, we are concerned for two reasons: it impacts the pilot boats and endangers pilots and crews, but it also impacts the navigation safety of large commercial vessels coming in and out of port.

Mr. WEBSTER. Is that because they are going too slow?

Mr. DIAMOND. Yes, sir. These improved channels were designed and built by the Army Corps of Engineers for a certain size of ship. The ships transiting these channels now are far bigger than the channels intended. So, the only way to keep these large ships in the channels, especially at the times of the year when the winds and currents are perpendicular to the channel, the only way to keep the ship into port is to have what is called a crab angle, increased speed, so you are actually moving through the water like this, not like this. That takes speed and water over the rudder. And the only way to have adequate control of the vessel in heavy

conditions like we are talking about is to increase speed. Ten knots is not safe in many, many conditions for a large commercial vessel.

Mr. WEBSTER. OK. Are you familiar with the manatee?

Mr. DIAMOND. Yes, sir.

Mr. WEBSTER. So, one of the solutions for saving the manatee is some sort of propeller protection. Is that available for these ships that you are talking about?

Mr. DIAMOND. Well, certainly for pilot boats. The smaller boats that are used, there are certainly encasings around the propellers that can help. A number of pilot boats on the East Coast are moving to jet boats, where there are no propellers at all. So, yes, for the pilot boats, absolutely. There is technology, and the technology is being used.

Mr. WEBSTER. So, your concern is for the smaller boat, and yet the larger boats are endangered because of the speed limits. Is that correct?

Mr. DIAMOND. Yes, sir. We have a twofold concern.

Mr. WEBSTER. Is it a safety concern for both sizes?

Mr. DIAMOND. Yes.

Mr. WEBSTER. And both is a maneuverability concern?

Mr. DIAMOND. Yes. So, in order to transfer a pilot from the pilot boat to the ship, the ship is moving, and generally has to move fast enough to ensure the ship is stable. And then the pilot boat goes alongside the moving ship, again, at speeds carefully calculated to make sure that the transfer is done safely. You can't do it stopped. The ships are moving like this; you just can't do it. So, you have to maintain an adequate speed to get next to the ship, have a stable platform, and then the pilot boards the ship by climbing up a rope ladder. That is the only way to do this. And as I said, eight pilots have been killed in the transfer process since 2006. This is a dangerous operation.

And I am certainly not implying that NOAA has done this on purpose, I am not. But the unintended consequences of what they are proposing will make an already dangerous operation more dangerous.

Mr. WEBSTER. Thank you very much. I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Ms. Hageman for 5 minutes.

Ms. HAGEMAN. Thank you, Mr. Chairman. I am grateful to be here today, and I want to thank each of the witnesses for their willingness to come to Washington to testify.

The Biden administration has initiated an unprecedented attack on outdoor recreation, making it harder for everyday Americans to recreate on public lands and waters. While the types of activities we enjoy vary depending upon our geography, me being from Wyoming, we share the negative consequences of over-burdensome regulations related to recreation that is being imposed by this Administration.

And I hate to tell you this, but it is going to be very difficult to ultimately protect the right whale, and not because of your industry, but because the Biden administration, the activist bureaucrats at the NOAA, and the so-called scientists refuse to acknowledge perhaps the most significant threat to the species at issue: the construction and operation of the multiple wind energy

projects in the Atlantic Ocean. And their obsession with global warming will ultimately make it impossible to protect the right whale and other species because they refuse to acknowledge that their cure is not only wrongheaded, but so environmentally destructive.

The fact is that they don't care about the right whale, or the millions of birds that are being killed, or the poor little children mining cobalt in the Congo. They care about destroying disfavored industries and furthering a radical agenda that threatens important food and other industries. Now, we are seeing an attack on thousands of recreational vehicle owners. And with more than 63,000 registered recreational saltwater vessels measuring 35 to 65 feet in states across the proposed impacted area, this proposed rule has the potential to impact more than 340,000 American jobs and the destruction of nearly $84 billion in economic contributions.

I particularly appreciated the testimony of Captain Fred Gamboa, who said, "I am not an outsider speculating on how the proposed rule may impact charter boat operations like mine and many others up and down the coast. I know how to operate my business and what my customers want from a trip on one of my boats." The bureaucrats in Washington either don't know what Mr. Gamboa knows, or they simply don't care about the facts, and neither answer is acceptable.

Captain Gamboa, can you describe for us the ripple effects in your coastal community's economy if charter captains have to start canceling fishing trips?

And what I mean by that is that I would assume that there are going to be many other businesses that are affected because of this rule. Am I correct?

Mr. GAMBOA. Yes. Well, my community of Point Pleasant, New Jersey, it starts from the restaurants, tourism, the town itself, which relies on all the boats. I mean, I have a tour set up this week with some people that want to come and see me and spend the day in my shoes—from the marina operators, fuel, oh, my goodness, it just——

Ms. HAGEMAN. It is just going to devastate the economy, in other words, if this rule were to go into effect.

Mr. GAMBOA. Absolutely.

Ms. HAGEMAN. But what is interesting is I am curious to understand a little bit more about the analysis that NOAA used to estimate the economic impacts that could result from the proposed rule. NOAA estimates that boats like yours would still conduct business under a 10-knot speed limit that includes waters from the beaches out 90 miles for up to 7 months of the year. NOAA assumes your boats would still sail, but would just have to go slower, and NOAA also estimates that the increased time on the water results in only a $3,000 impact per vessel per year. That number seems a bit off, compared to what you have described in your testimony.

Can you explain how the NOAA analysis is flawed, and why your boats that are over 35 feet could not be used to run charters with a 10-knot vessel speed restriction in place?

Mr. GAMBOA. One particular trip that we offer is a trip out for tuna, which is anywhere from 70 to 100 miles. It would take us 8

hours to get there. No customer would ever pay the money. The trip would be canceled.

Ms. HAGEMAN. I imagine that you occasionally experience weather that is not very calm, perhaps with winds that create sizable waves. What would happen if you had to stay below 10 knots in unfavorable weather conditions?

Mr. GAMBOA. We have been in situations when we are out 70, 80 miles, and the wind comes up out of the east. It just happens. And if we don't get out of there in time, those 1- to 2-foot seas become 9- to 10-foot seas within an hour.

Ms. HAGEMAN. Did anyone from NOAA contact you personally about the potential impact of this proposed rule on your business?

Mr. GAMBOA. No, ma'am.

Ms. HAGEMAN. OK. I yield back. Thank you.

Mr. BENTZ. Thank you. The Chair recognizes Mrs. Luna for 5 minutes.

Mrs. LUNA. According to NOAA, between 2017 and 2023 there were about 98 documented dead, serious, or sub-lethal injuries or illnesses that impacted the North American right whale. But this means about 70 percent of those documented deaths, serious injuries, or sub-lethal injuries or illnesses have impacted that whale. This proposed rule, though, will impact an estimated 63,000 registered saltwater boaters, 340,000 American jobs, and nearly $84 billion in economic contributions.

And like all Americans, I think that we believe in protecting endangered species and wildlife. However, when you are looking at the impacts that it is going to have on human beings—which I am sure every single person here would agree that a human being is obviously more important than an animal—I think that it is kind of an elitist perspective to propose a rule that is going to actually hurt people and, I believe in some cases, keep people in poverty.

If the Biden administration was so concerned about marine life, and some great points that were brought up by my colleague to the right of me, I believe that they would be working on studying the impact of windmills on whales, which our own Chairman, Chairman Westerman, has so graciously asked for a study to be conducted on, because we are seeing that in areas like off the coast of New Jersey, many whales are washing up dead, and they have no reasoning why this is happening. And we have a hunch that it is because of those windmills.

My question is for you, Ms. Coit. I have heard that stakeholders presented the idea of having a whale vessel safety task force, but NOAA was unwilling to engage with them. Why is that?

Ms. COIT. Thank you for your question. Actually, Jon Hare, who is the head of our Northeast Fisheries Science Center, is going to be engaging with that task force. And Frank and I made sure he was connected to that a few weeks ago.

Mrs. LUNA. Is that something new?

Ms. COIT. We will be participating.

Mrs. LUNA. OK. So, you guys are going to be doing that now. Because I know that, if you guys are proposing rules and it is impacting people, and then you don't want to meet with them or hear their ideas, it kind of makes you guys look bad.

What information did NOAA rely on for the determination of placing this restriction on vessels between 35 and 65 feet?

Ms. COIT. Thank you for the question. It was based on science and information that we had about vessels less than 65 feet striking and killing right whales and other whales. So, we have several instances just in the last few years of vessels of that size going at speeds greater than 10 knots striking and killing right whales, one off the coast of Saint Augustine, Florida that killed a calf, and then the——

Mrs. LUNA. OK. So, just based on some of the data that you are receiving?

Ms. COIT. Based on the data——

Mrs. LUNA. Per an off-record conversation with the Coast Guard, they annotated that you guys did not speak with them before dropping the proposed rule. And this would expand the mission and requirement of the U.S. Coast Guard. Why is it that NOAA did not consult the Coast Guard before proposing this?

Ms. COIT. Thank you for the question. We are in touch with the Coast Guard regularly, and work closely with them on enforcement issues. And I can't speak to the conversations we had specific to the rule. I can tell you that we interact with them on a daily basis.

Mrs. LUNA. OK, I am just letting you know what they told us. And the reason I bring that up is because, obviously, you know that we had a huge issue with drug interdiction off the coast and bad people trying to bring bad things into the country. When you guys are proposing that speed limit, I mean, I am sure the cartels don't really care about your 35-whatever requirement, speed limit. That is why I asked that question.

Mr. Gamboa, my next question is for you. What months do you consider prime boating months?

Mr. GAMBOA. May through December.

Mrs. LUNA. If this rule takes effect, what economic impacts would it have on your business?

Mr. GAMBOA. Oh, I will lose over 70 trips. That is a third of my business.

Mrs. LUNA. Would that put you in a position of struggle?

Mr. GAMBOA. Selling the boats. They would have to go.

Mrs. LUNA. Did NOAA engage with you in a conversation about how the fishing industry and agency would work together to conserve the right whale prior to publishing this proposed rule?

Mr. GAMBOA. No.

Mrs. LUNA. Do you think that that is fair, for a government agency to tell you, a private individual, what to do?

Mr. GAMBOA. Absolutely not.

Mrs. LUNA. OK. I am just going to sit here and speak for all the fishing community that I have back home. It is pretty messed up to have a Federal agency come in and then tell people how to run their businesses without talking to them first. But it is even more messed up when you realize that it is very possible that this rule could put people on the streets, and we are already seeing record-high inflation right now.

So, Chairman, I yield my time.

Mr. BENTZ. Thank you. The Chair recognizes Mr. Collins for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman.

Ms. Coit, when was the North Atlantic right whale placed on the endangered species list?

Ms. COIT. The North Atlantic right whale has been on the list since the Endangered Species Act was enacted in 1973.

Mr. COLLINS. 1973?

Ms. COIT. It was put on a list in 1970 of endangered species prior to the enactment of ESA.

Mr. COLLINS. And just in my investigating, looking at the population, it has pretty much remained constant, since you all have been doing some good reporting since the 1980s, somewhere between that 300 to 450 range, give or take 50, right now.

So, when you look at this, it is either going to be something that is either internal forces or external forces that are keeping the population from growing, because we know it has been pretty much consistent, according to the data that you all are putting out.

Do you know what the calving cycles are for the right whale?

Ms. COIT. Excuse me, did you say the calving cycles?

Mr. COLLINS. Yes.

Ms. COIT. Yes. So, first, if you will, the population was growing, and was on its way up, up to 450 individuals, up until——

Mr. COLLINS. Well, we are getting to that. What is the calving cycle?

Ms. COIT. So, the calving cycle is—because of poor conditions, it is actually being extended——

Mr. COLLINS The calving cycles used to be between 5 and 7 years for one calf. Now it is up to 7 to 9 years. You might as well say 8. So, they are having less calves per female, according to all the documentation that I keep reading from NOAA and from some of the other people that are out there.

Ms. COIT. That is correct.

Mr. COLLINS So, we can say that that is internal, for the calving cycles to be going down, and them having less calves per female over the life span of the female.

Now, according to other data, we have had 15 whales that have been killed in 18 years. And according to Dr. Redfern, 4 of them came from 35- to 65-foot boats. And, also, according to what I have been able to tell, according to what Dr. Redfern has reported, that you all know how deep these whales actually stay or hang out at, for a lack of better words, through the tagging.

So, the strike zone on these right whales are 10 meters, is that correct? Is that what we have been saying, Ms. Coit?

Ms. COIT. I am sorry. The females and the calves spend a lot of time on the surface, and——

Mr. COLLINS. Well, first of all, you don't even count a calf as a population until they are over a year old.

Ms. COIT. Correct.

Mr. COLLINS. And as my colleague, Mr. Wittman, said, you all aren't even counting the shark strikes on that, because you don't count the calves. So, it is really a goofy type of population count that you have there, but that is OK.

The average right whale strike zone, according to NOAA, is 10 meters.

[Pause.]

Mr. COLLINS. This is your data.

Ms. COIT. I didn't know if it was a question. Yes.

Mr. COLLINS. I have already had this conversation with the Administrator, so now I am going to have it with you. It is 10 meters.

And your area that you have this 10-knot rule in is basically around the Boston area, if I am right, just up in that little northeastern area, right in that little corridor. I had some charts, but I didn't bring them out.

Gosh, my time is going down fast. I am from the south, talk real slow.

[Laughter.]

Mr. COLLINS. How many registered boats do we have 35- to 65-foot? How many registered boats?

[No response.]

Mr. COLLINS. You should know this.

Ms. COIT. Yes.

Mr. COLLINS. You are impacting them.

Ms. COIT. I would have to get back to you with that number. I don't have it in front of me.

Mr. COLLINS. There are 63,000 boats. Now, if we have had 15 killed in 18 years, 4 of them came from 35- to 65-foot boats, ma'am, that is over 1 in 1 million odds that you are going to hit this whale. Would you agree?

I mean, you can sit there and that is common sense, correct?

So, now you are going to expand the area from right up there in that little northeast area all the way down the eastern coast, and as far out as 100 miles. I don't even know how we get to saying that this is anywhere near common sense.

I mean, Mr. Gamboa, I have to apologize to you. This is what we fight every week up here, every week. It is just another example, glaring example, of government over-reach. And this time it is really absurd. I mean, let me put it to you in a different—I am sorry, I have to go over, but this Administration has been so hung up on teaching sex education, maybe you should focus on teaching sex education to the right whale, get them back on their calving cycles that they need to.

Ms. Coit, your agency has two options.

Mr. BENTZ. The gentleman's time has expired.

Mr. Rutherford, you are recognized for 5 minutes.

Mr. RUTHERFORD. Thank you, Mr. Chairman.

Ms. Redfern, you conducted this assessment that the rules are based on, correct?

Dr. REDFERN. No, I did not. I have just reviewed it carefully, because we have done some of our own vessel strike risk modeling on the East Coast.

Mr. RUTHERFORD. So, Ms. Coit, who actually conducted the assessment that made the recommendations that we needed to increase enforcement, modify safety deviation, expand the speed restrictions to small vessels, and change the deviation provision to only include less than 65-foot vessels in gale force winds? Who developed that?

Ms. COIT. Thank you for the question. The lead author on that was a scientist who works for NOAA Fisheries, and it was developed with a team of people looking at the best available science.

Mr. RUTHERFORD. OK. Are these the same people that said in the regulatory impact, and that came out of the regulatory impact review, or no?

Ms. COIT. No. The assessment came first, and was released in January 2021, and the regulatory impact review was released as part of the proposed rule——

Mr. RUTHERFORD. OK. It was based on the rule that you anticipate deploying.

Ms. COIT. The regulatory impact review was issued with the proposed rule and the draft economic impact analysis.

Mr. RUTHERFORD. Right. So, the idea that we don't need to be talking about this now because it is not even a rule yet is, I hate to say it, but I think it is ridiculous. This is exactly the time we need to be talking about these things, because I think some huge mistakes have been made in the study of the issue.

For example, it was just mentioned that the regulatory impact review said 9,200 recreational vehicles would be impacted out of 15,899 total vessels that were going to be impacted. But we know there are 63,000, as you just heard from Mr. Collins, 63,000. So, the math is bad. And NOAA always seems to get the math bad, but move forward and charge forward anyway. I don't understand it.

So, in the study, apparently, nobody looked at draft. How low does the ship sit in the water? I mean, we have heard that 10 meters is where the strikes are occurring. So, I would like to ask Ms. Redfern.

My understanding is there have been four strikes by vessels less than 65 feet in the last 8 years, something like that.

Dr. REDFERN. Since the 2008 rule was implemented, and two since 2020.

Mr. RUTHERFORD. OK. Can you tell me the length of those four vessels and the draft of those four vessels?

Dr. REDFERN. I can tell you the length. Would you like me to tell you——

Mr. RUTHERFORD. The length doesn't matter. It is how deep it is sitting in the water. That is what is going to matter. You all aren't even looking at draft.

Dr. REDFERN. The model used to develop where risk is highest, to predict where the risk is going to be the highest, what is important about understanding that is NOAA used that model to get the prediction. It does take into account drafts of vessels based on AIS data and the type of ship. Then they cross-validated those predictions using other information about where right whales occur that weren't included in the model to cross-check that they had gotten their area right. And that is how you can overcome any potential issues with parameters in the models, because you are using other data to support it.

Mr. RUTHERFORD. Well, but when you start off with the wrong numbers to begin with, it is garbage in, garbage out.

Let me move on. So, the conversations that we are having now about what really is important in trying to determine how we can best protect the right whale, Ms. Coit, going back to you, can you

tell me the conversations that you had with the industry, with the boating public about this?

My understanding is there was no conversation before the assessment and the impact review came out. Is that true?

Ms. COIT. There were conversations after the assessment came out, and——

Mr. RUTHERFORD. Yes, afterwards. I would have thought you would want their input so that they could help you come up with better findings that are really based on the evidence.

With that, I see, Mr. Chairman, my time is expired, and I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Ms. Hoyle for 5 minutes.

Ms. HOYLE. Thank you, Mr. Chair. I yield my time to Mr. Huffman.

Mr. HUFFMAN. I thank the gentlelady.

Deputy Administrator Coit, I just wanted to give you a chance to expand on any of the answers where maybe you were cut off, or didn't have a complete chance to finish your sentence. That happens a lot in these hearings.

Ms. COIT. Thank you for that opportunity. I just wanted to be clear for the record that the current rule includes seasonal speed restrictions in the southeast, for example, where there are the important calving grounds now. So, I just wanted to correct that.

And the proposed rule, of course, is suggesting an expansion in some areas, not off the coast of much of the southeast, but an expansion in the northeast, but is not in place during the summer months, when a lot of the recreational boating occurs. So, I just wanted to make sure, because it didn't seem to come through——

Mr. HUFFMAN. And why is that? Why would you tailor the rule to those time periods?

Ms. COIT. Because of where the whales are.

Mr. HUFFMAN. Right.

Ms. COIT. The calving grounds and the calving season in the late fall is critical. Everyone has talked about the importance of reproductive females. There are only an estimated 70 left, and they are critical if we are going to stabilize this population and increase this population.

So, the rule starts with the restricted areas in the late fall, where the calving areas are, and then those are in place for 5 months in largely the same area that they are in now, off the coast of the southeast. And then, as the whales migrate north, the rule covers where we have confirmed whale sightings.

In the Mid-Atlantic, for instance, it is not in place now. And even the proposal wouldn't extend beyond May. And the whales are now going north into Canadian waters. And we are working closely with Canada, who also has vessel speed restriction, and is taking other measures. And that is an important part of our strategy.

Mr. HUFFMAN. And that is because you want to minimize the impact to boating, right?

Ms. COIT. Correct. We tried to tailor this to minimize the economic impacts while reducing the threat to whales.

Mr. HUFFMAN. Dr. Redfern, same thing. Did you want to expand on anything that you didn't get a chance to, previously?

Dr. REDFERN. Yes, I thought the question about natural mortality was really important. The point there is, if natural mortality is occurring, we have to stop the human-caused mortality to prevent the extinction of the species. And that is——

Mr. HUFFMAN. Natural mortality kind of occurs in nature.

Dr. REDFERN. Exactly. So, we need to control what we have the power over, which is human-caused mortality, which is what the proposed rule—it is about reducing vessel strike risk.

Mr. HUFFMAN. All right. Anything else that you didn't get a chance to fully articulate?

Dr. REDFERN. I think I appreciated what Janet said about going on the record. And I want to go on record that the proposed changes were based on the best available science, not just the model, but looking at where previous strikes of whales have occurred, and making sure those areas are now protected. That is what the expanded seasonal speed zones do.

We know we need to make speed rules mandatory. I think that was another question that was asked earlier. Over a decade of research shows low cooperation with voluntary measures. So, I think that these proposed changes are critically important, as well as extending to smaller vessels, because we know that they have hit whales, and as recently as since 2020.

Mr. HUFFMAN. All right, I appreciate it. I want to really associate myself with the comments that Mr. Magaziner made earlier. This is not an easy assignment to do this rulemaking. I think there has been some over-simplification of what this is all about, a little bit of gratuitous attacks on the scientists and officials at NOAA that are trying to do this, and a complete lack of recognition that you are in the middle of a pending proceeding and we haven't seen your final product yet.

So, many of the things that have been stated today, presumably, will be taken into account when the final rule is issued, and I think we should give NOAA the opportunity to do its job. And then if folks want to pounce all over this rule and accuse it of shutting down all boating up and down the East Coast, I suppose we can have that conversation then. But I want to see what they produce.

And I also want to keep in mind the context for this conversation. The science is telling us that vessel strikes, if we don't do something about them, are going to cause this whale to go functionally extinct in just a few years, on our watch. The law requires NOAA then to do something about this issue. We can't just offer thoughts and prayers, and act like we care about whales, and are discharging our duty under the Marine Mammal Protection Act and the ESA. The law requires something. And I think we ought to give NOAA a chance to come up with the most thoughtful, but effective rulemaking that they possibly can.

With that, I yield back.

Mr. BENTZ. Thank you. The Chair recognizes Mr. Carter for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman, and thank you for allowing me to waive on to this Committee.

I don't have the pleasure of serving on this Committee, but I do represent the entire coast of Georgia, over 100 miles of pristine coastline. It is my home. It is where I have lived all my life, where

I intend to live the rest of my life. I care deeply about the coast of Georgia. I care deeply about our economy.

And we have two major seaports, the Port of Savannah, the No. 3 container port in the country, the Port of Brunswick, the No. 2 roll-on/roll-off port in the country. And that is why I am here today, is because these proposed rules are going to have a big impact on those ports.

They are also going to have a big impact on our blue economy—that is, our fishing. I mean, aside from the fact that we only get 2 days a year to fish for red snapper, we do fish a lot down there, and we enjoy it, and it brings a lot to our economy. And that is why this is so very important to us. It is one of the reasons why we have a thriving economy down here.

But I am really worried. I am very worried about the speed restrictions that are imposed by NOAA's rule that would shut down all these thriving communities and kill our blue economy all up and down the coast, not just in the Savannah area, but also in the 100 miles of the coastline there.

And, look, we all want to protect the right whale. The right whale is the state mammal of Georgia. We love the right whale. We want to protect it. We don't want to see it become extinct. But we have only had six lethal strikes off the coast of Georgia since 1999. Do we need policies? Yes, we need policies, there is no question about that. But we need smart policies that are going to work, and that aren't going to destroy our economy.

And that is what we want to do. We want this. And we are in bipartisan agreement. I don't think there is anyone on the other side of the aisle who wants to hurt our ports or our economy, and I don't think there is anyone on my side of the aisle who wants to see the right whales go extinct. So, there has to be a sweet spot there. There has to be somewhere where we can find some kind of common ground, if you will.

One area that I am concerned about is our harbor pilots. And I know we have some from my district here today, and they have to be considered in crafting this rule. And I know, Deputy Administrator Coit, you and I have talked, and I appreciate your engagement, and I appreciate your input. But I am very concerned about our harbor pilots, and their safety, and the ports' overall operation. You stop the ports, and we have major economic problems in my area, not just for the Savannah area, not just for the coast, but the whole southeast United States. It is the economic engine of the southeast United States.

I want to ask you, Mr. Diamond, you mentioned that NOAA is attempting to overtly introduce criminal sanctions to the North Atlantic right whale speed regulations. Can you elaborate somewhat on that?

Mr. DIAMOND. Thank you, Mr. Carter. Yes, this is a big concern that we have.

In the proposed regulation, NOAA chose to very clearly state that there are potential criminal sanctions, including prison, to violate the speed limit, attempt to violate the speed limit, solicit another to violate the speed limit, or cause the speed limit to be violated.

And why we are so concerned about that is pilots have to be free to use their judgment, split-second judgment, in maneuvering, as you point out, massive container ships. And limiting a pilot's flexibility right at the time that they need it most is really unsafe. And this language really will cause pilots, at the most critical point in the navigation of the vessel, to be second-guessing themselves with this kind of aura of criminality hanging over their head, and they may be hesitant to make a decision.

And it is unfair and it is unnecessary to criminalize what is, at its heart, a prudent navigation safety——

Mr. CARTER. I had the opportunity to ride on one of the harbor pilot boats before. And I am telling you, talk about stressful.

We just finished the deepening of the Savannah Harbor Expansion Project. We went from 42 feet to 47 feet depth in order to accommodate the post-Panamax ships, the bigger ships. Those ships that are coming through now are enormous. And the pressure that is on those harbor pilots, in the back of their mind they are going to be thinking about criminal prosecution if they do something wrong, or if they exceed a speed limit. You can't do that.

Anyway, Mr. Chairman, again, I appreciate you letting me waive on to this Committee. This is important. Just because you are not on Natural Resources doesn't mean that you are not interested in it. We are interested in it very much so in Georgia and on the coast of Georgia. So, please keep that in mind.

Thank you all. I appreciate it, Mr. Chairman, and I yield back.

Mr. BENTZ. Thank you. The Chair recognizes himself for 5 minutes.

Ms. Coit, it is a bit of a surprise to see the huge difference between the amount of economic impact estimated by your agency on the one hand of this rule, and that which we have been hearing. I think, as I understand it to be, around $40–$50 million, do I have that right?

Ms. COIT. Thank you, Mr. Chair. Yes, the draft economic impact analysis is at $46 million, approximately.

Mr. BENTZ. Right. And what we have been hearing today is something closer to $84 billion, that is billion, with a B.

The reason I bring this up is because I am from Oregon, and I watched the spotted owl situation. The owl had nothing to do with it, other than being the tool that was used to take everyone out of the millions of acres of woods on the West Coast, about 90 million acres, to be exact. And Oregon has never recovered. And the challenge is now for those small towns, whether it is drug addiction, or whether it is suicide, or whether it is other things that happened once those jobs were removed, have an enormous, enormous cost.

And I am thinking now that we know that the reduction in population was the barred owl, we kind of want to get these things right. And to see this huge difference suggest $84 billion on the one hand versus $40-some-odd million on the other seems to reflect a miscalculation that we simply can't allow to happen.

I want to mention also in the middle of my little state is a situation that involves a spotted frog. It has been estimated that the cost of recovering the spotted frog is $2.8 billion. And that is not necessarily the economic impact. So, the challenge here is to call out exactly what the cost of these activities is.

And I would hope that in the revised rule that we would see something more inclusive of the type of challenges that Mr. Gamboa has been talking about, because I understand them absolutely clearly looking back into Oregon, and looking at the huge, even today, amount of damage that folks are still trying unsuccessfully to recover from. So, this is certainly something we want to try to get right, and I am glad you are working at it.

That brings me to the amount of money that you are taking from the Inflation Reduction Act, so-called, to try to figure out an electronic means perhaps of addressing this issue. Can you share with us how you reach the number that you have come up with, and what chances you think of success actually are out there somewhere in the, I hope, near future?

Ms. COIT. Thank you, Mr. Chairman, and I really appreciate you sharing your perspectives on these issues.

The funding in the Inflation Reduction Act, we had a lot of competing priorities, but we had fortunately already been looking at how much money we needed to expand the passive acoustic monitoring system and other monitoring for right whales. It is something that we had already taken a look at and assessed, so we were able to direct funding to that effort based on an assessment that we had already been doing because we knew it was such a priority, and we were looking for funding and, frankly, talking to House and Senate appropriators about what we would need for that.

Mr. BENTZ. The question is, is it enough to get this situation resolved, or is it just throwing money at the problem and then coming back and asking for more later?

Ms. COIT. I think, as with all of these issues, it is not just the Federal Government alone. So, it will be partnerships with industry, partnerships with other Federal agencies like NASA and the Navy that are already working on this type of technology that will be required, not just our funding and our effort. And we look forward to that collaboration.

Mr. BENTZ. I suppose the proper question would be how many other actions proposed by the agency are going to possibly cost $84 billion, and I would think that there is warranted an investment, certainly, of the amount that you are suggesting. So, I am happy you are doing it, and I hope for a quick and speedy outcome.

I want to thank the witnesses for their valuable testimony today, and the Members for their questions.

The members of the Committee may have some additional questions for the witnesses, and we will ask you to respond to these in writing. Under Committee Rule 3, members of the Committee must submit questions to the Subcommittee Clerk by 1 p.m. Eastern Time on Friday, June 9. The hearing record will be held open for 10 business days for these responses.

I ask unanimous consent that the testimony from the Congressional Sportsmen's Foundation expressing concerns and opposition to the proposed changes be entered into the hearing record.

Without objection, so ordered.

If there is no further business, without objection, this Subcommittee stands adjourned.

[Whereupon, at 12:16 p.m., the Subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

Submissions for the Record by Rep. Bentz

Congressional Sportsmen's Foundation

June 5, 2023

Hon. Cliff Bentz, Chairman
Hon. Jared Huffman, Ranking Member
House Committee on Natural Resources
Subcommittee on Water, Wildlife and Fisheries
1324 Longworth House Office Building
Washington, DC 20515

Dear Chair Bentz and Ranking Member Huffman:

In advance of the Subcommittee's June 6, 2023, oversight hearing on "Examining the impacts of the National Oceanic and Atmospheric Administration's proposed changes to the North Atlantic Right Whale Vessel Strike Reduction Rule", the Congressional Sportsmen's Foundation (CSF) would like to offer the following written testimony for the record. While we fully support meaningful efforts to conserve whales and other marine species, we would like to express our strong concerns and opposition to the proposed changes to the North Atlantic right whale vessel speed regulations as published in the Federal Register on August 1, 2022 (Docket No. 220722-0162). Specifically, we were disappointed by the National Marine Fisheries Service's (NMFS) lack of engagement with the angling and boating community in the development of the proposed rule, the egregious assumptions made in the vessel strike risk modeling regarding vessels 35–65 feet in length, and the rule's focus on a draconian regulation that avoids meaningful mitigation measures while causing significant and unnecessary harm to angling and boating access and coastal economies along the Atlantic seaboard.

The proposed North Atlantic right whale vessel strike reduction rule would amend current vessel speed regulations in the Atlantic by requiring boats 35 feet and longer to travel at no more than 10 knots, from the shoreline to as far as 90 miles offshore, for up to 7 months of the year. The new proposed slow speed zone stretches from Massachusetts to Florida, as opposed to discreate speed reduction areas currently in effect for vessels 65 feet and larger.

The recreational marine industry accounts for $203 billion in national economic contributions, supporting over 800,000 U.S. jobs and 36,000 businesses. In Atlantic coastal states alone, recreational boating and fishing is a crucial economic driver, supporting 340,000 American jobs and nearly $84 billion in economic activity. Recreational fishing is an important cultural pastime across the United States, including along the Atlantic Coast. In fact, according to a query of the Marine Recreational Information Program (MRIP), Atlantic states anglers took nearly 6.4 million trips in federal waters in 2022. It is difficult to understand how representatives and stakeholders of this important component of the American economy and culture were not consulted or given an opportunity to be part of meaningful solutions to the conservation challenges facing North Atlantic right whales, but instead are facing a devastating rule created in a vacuum that will have far reaching negative implications for recreational access and coastal economies.

The vessel strike risk assessment modeling used to justify the proposed rule relied on several inaccurate assumptions. For instance, the NMFS Technical Memorandum (TM) noted that ". . . the high densities predicted along the mid-Atlantic may not be realistic." The admittedly high whale density bias likely produced model outcomes that are inconsistent with actual risk. However, this assumption ultimately led to the drastically expanded seasonal management zones in the proposed rule.

Another example of an erroneous assumption used in the risk assessment model centers on vessel draft depth. The model assumed a draft depth of 10 meters for all vessels, which is 32.8 feet or 394 inches. Yet, a 35-feet center console fishing boat typically drafts only 36 inches with engines down, or 9.1% of the assumed draft depth. Essentially, a 90% reduction in the modeled probability of a 35-feet center

console striking a North Atlantic right whale could be achieved simply by correcting the model to reflect realistic draft depths.

Furthermore, NMFS failed to consider safety at sea for vessels under 65 feet, and particularly center consoles and those powered by outboards, which are designed to run on a level plane at higher speeds with less hull in the water column. Operating at 10 knots or less is below planning speed, forcing the bow to ride high, blocking visibility for the operator and potentially leading to collisions with hazards in the water, including North Atlantic right whales or other vessels. In addition, the proposed rule would take away a primary safety feature of recreational boats 35 feet and larger, which often must use speed to avoid weather events such as thunderstorms where a vessel could return to port or avoid a line of thunderstorms. Finally, the safety deviation provision only in the case of a gale-force wind advisory by the National Weather Service is a clear indication that the authors of the rule are not familiar with the vessels they intend to regulate. By the time a gale-force wind advisory (39–46 mph) is issued, the sea conditions, in almost all circumstances, will have deteriorated to a point that most vessels in the 35–64 feet class caught at sea will unlikely be able to achieve planning speed and return to safe harbor in a reasonable amount of time.

While significant questions remain as to the validity of the modeling exercises used to arrive at the proposed rule, ultimately the overly precautionary expansion of the seasonal management zones will do little for whale conservation. Based on the number of suspected North Atlantic right whale strikes by boats 35–64 feet in length over the last 15 years, versus the number of fishing vessel trips taken during that same time, there is less than 1 in 1,000,000 chance of recreational fishing boats in this category fatally striking a whale under existing regulations.

Instead, NMFS should work with the fishing and boating community on technologically based solutions that involve real-time monitoring and vessel notifications as to the presence of whales before implementing changes to current regulations. In fact, Congress has already authorized such a solution in the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023 (Public Law 117-263) by directing NMFS to implement a pilot program involving real-time monitoring of whales, and following implementation of the pilot program, to provide a report on how the program was used to, ". . . direct sector-specific mitigation measures that avoid and significantly reduce risk of serious injury and mortality to North Atlantic right whales." Unfortunately, this program received no funding as part of the NDAA authorization level ($5 million), however, CSF and our partners are advocating for funding for this program in the upcoming appropriations bills. CSF maintains that funding this program will provide real-time data and information on the movement of right whales to help guide reasonable and calculated conservation efforts that will not devastate the recreational fishing and boating industry.

CSF stands ready and willing to work with NMFS on real-time monitoring and vessel notification technologies that provide meaningful conservation measures to conserve North Atlantic right whales while maintaining access to our Atlantic fisheries resources and protecting coastal economies.

Sincerely,

CHRIS HORTON,
Senior Director, Fisheries Policy

Statement for the Record

Passenger Vessel Association
Edmund B. Welch
Legislative Director

The Passenger Vessel Association (PVA) is the national trade association representing owners and operators of U.S.-flagged passenger vessels of all types, including ferries and commercial whalewatching vessels. PVA respectfully submits this statement for the record concerning the proposed revision of the current rule on speed limits for certain vessels to protect North Atlantic Right Whales. PVA submitted a comment to the regulatory docket on October 31, 2022; that comment is attached.

No PVA vessel has ever collided with a right whale.

The existing rule has been successful

More than 15 years ago, NOAA put into effect the current rule imposing 10-knot speed limits for most vessels of 65 feet or more in length in designated places and times along the U.S. East Coast. According to NOAA's own statistics, the rule has proven to be successful. Vessel strikes of right whales are down considerably, although they have not been eliminated.

During the 15 years since the inception of the rule, NOAA says that there have been 10 confirmed or assumed instances of vessel strikes that resulted in deaths of or serious injuries to a North Atlantic right whale. See the Draft Environmental Assessment at 9.1 Appendix A Table 1 (pages 1–2). The table lists 12 whales struck but NOAA's explanation reveals that in two separate instances, a single vessel strike killed a mother and young whale in the same incident. Thus, in the 15-year period, there have been 10 vessel strikes causing death or serious injury.

Of these 10 vessel strike incidents, four involved a vessel determined to be of less than 65 feet in length. In other words, the existing rule did not apply to these four vessels.

Of the remaining six vessel strike incidents, five involved vessels of unknown length, and only one involved a vessel known to be 65 feet or more in length (thereby subject to the rule). Thus, no more than six, and perhaps as few as one, vessel strikes involved a vessel of 65 feet or more in length.

Of these six strikes, it appears likely that three of them took place in a location and time during which a Seasonal Management Area was in effect, and three took place in a location and time when neither a Seasonal Management Area nor a Dynamic Management Area was active.

During the 15-year period of the existing rule, there have been but three documented or assumed instances of a vessel of 65 feet in length or more striking a right whale in an active Seasonal Management Area. There seems to be no indication of a covered vessel striking a right whale in a declared Dynamic Management Area.

One can draw the reasonable conclusion that the existing rule, coupled with other protective management measures, education, and vigilance by mariners, has been highly successful in preventing ship strikes of right whales. It has targeted the places and seasons that ship strikes are most likely to occur. It has accomplished this success without imposing an unreasonable burden on maritime interests or the general public.

The proposed rule will impose dramatic impacts for diminishing returns

The proposed rule dramatically expands the geographic reach of the mandatory 10-knot speed limit. Speed zones will be put in place, either seasonally or temporarily, from Maine to Florida. They will extend from the coastal shoreline to perhaps 75 miles offshore. They will affect thousands of vessels not currently covered by the mandatory speed limits.

Accepting the estimates of the Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis, the proposed rule will affect nearly 16,000 vessels and have an annual economic impact of over $46 million. Not only will the proposed rule directly impact thousands of additional vessels, it will also indirectly affect many more individuals. Recreational boaters by the thousands will have to adjust their behavior. Members of the public who recreate by patronizing the many small businesses that offer charter fishing opportunities and whalewatching cruises will likely find their recreational experiences degraded. The vessel operators engaged in these businesses face the distinct possibility that their customers, confronted with longer and more inconvenient voyages, will take their business and dollars elsewhere. Island communities that depend on reliable and predictable ferry services could see difficulties imposed on their residents and visitors alike.

To achieve very incremental progress regarding potential vessel strikes, the proposed rule imposes sweeping changes on the East Coast maritime sector and the customers and communities that the vessel operators serve.

PVA vessel members are moderately affected by the current rule but will be severely impacted by the proposed rule—especially ferries serving important Northeastern routes and commercial whalewatching companies.

The current vessel speed limit rule affects PVA members that operate vessels of 65 feet or more in length. The PVA vessel operators now primarily affected have routes in the waters of Cape Cod Bay and in and around the waters of the Stellwagen Bank National Marine Sanctuary. Three PVA members provide ferry service across Cape Cod Bay to Provincetown. Several PVA members offer commercial whalewatching cruises from various ports in Massachusetts to the waters of the nearby national marine sanctuary. Since the existing Seasonal Management Area speed limit in these waters is lifted as of May 15 of each year, the speed limit is not in effect during the bulk of these operators' seasons. As for Dynamic Management Areas, very few have been imposed on routes served by PVA vessel members. PVA members have been able to adjust their operations to meet the current regulations without too much adverse economic impact.

In contrast, the proposed rule will more dramatically impact many more PVA vessel operators. It will make it difficult to provide reliable and speedy ferry service to locations such as Fire Island, Martha's Vineyard, Nantucket Island, Block Island, and more. The extension of the Atlantic Speed Zone to May 30 will more severely impact PVA members offering ferry service across Cape Cod Bay, as well as whalewatching vessels transiting this body of water to reach the Stellwagen Bank National Marine Sanctuary. The establishment of Dynamic Speed Zones with a mandatory speed limit of 1O knots with a duration of at least 1O days could affect operators in the Atlantic Speed Zone at times of the year when the Seasonal Speed Limit is not in effect and could also affect operators in waters outside that zone (in Maine, for example). PVA members that operate offshore charter fishing trips from New Jersey and elsewhere will be affected by the Atlantic Speed Zone and potentially by Dynamic Speed Zones.

NOAA should undertake a full Environmental Impact Statement

To accompany the proposed rule, NOAA has posted a Draft Environmental Assessment. That document states that the National Marine Fisheries Service "considers this action to be a major federal action subject to NEPA [the National Environment Policy Act]." Section 1500.1 of title 40 *Code of Federal Regulations* reads: "Purpose and policy. (a) The National Environmental Policy Act (NEPA) is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process . . .. Section 102(2) of NEPA . . . requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment."

Section 1501.6 of title 40 *Code of Federal Regulations* states that the purpose of an Environmental Assessment is to enable the federal agency to decide whether to prepare an Environmental Impact Statement or to issue a FONSI (Finding of No Significant Impact).

The Draft Environmental Assessment states: "The purpose of developing an environmental assessment is to determine if the impacts of the proposed action are likely to be significant." It further says that the provisions of the proposed rule "are expected to affect thousands of mariners along the U.S. East Coast, and thus NMFS considers this action to be a major federal action subject to NEPA. Therefore, NMFS is assessing the environmental effects associated with this proposed action to determine if the impacts of this action are likely to be significant."

Prior to issuing the current vessel speed limit rule in 2008, NOAA prepared and published a full Environmental Impact Statement, preceded by at least one public hearing. With regard to the proposed amendment to the existing rule, NOAA has produced only a more limited Draft Environmental Assessment and has conducted no public hearing, even though the proposed rule will cover a vastly larger geographic area along the East Coast from Maine to Florida and even though it will affect a far larger population of recreational and commercial vessel operators, as well as the persons and communities that they serve.

At no point in the various documents filed to accompany the proposed rule is there any discussion of the likely impact that longer-duration trips will have on ferry passengers or the communities served by the ferries. Nor is there any examination of how customers of charter fishing vessels or whalewatching vessels will

react to trips of longer duration or last-minute schedule disruptions because of the declaration of a Dynamic Speed Zone. These are significant impacts affecting the quality of the human environment. These are glaring omissions from the Draft Environmental Assessment. They should be addressed before NOAA finalizes the proposed rule.

For a proposal of this impact and significance, it is not acceptable for the agency to figuratively "throw up its hands" and weakly say, "It is challenging to predict how different marine groups might respond, adjust, or otherwise modify operations to accommodate measures in the proposed rule. Further, it is unclear how these measures may impact vessel passengers or clients. The proposed changes to the measures may impact vessel passengers or clients. The proposed changes to the speed rule will impact a wide variety of vessel types and operators, and we anticipate decisions regarding changes to vessel operations will vary depending on the unique nature of a vessel's operations, needs, schedule, flexibility, and cost." Under NEPA, it is the agency's job to analyze these aspects of the proposed rule's impacts more fully.

Given that the Draft Environmental Assessment has already characterized the proposed rule as "a major Federal action subject to NEPA" and that the agency prepared a full Environmental Impact Statement on the current rule, which is more limited in scope and impact than is the proposed rule, the agency would be hard-pressed to issue a Finding of No Significant Impact (FONSI).

The Passenger Vessel Association urges NOAA to comply with the letter and spirit of the National Environmental Policy Act and its associated regulations by preparing and submitting for public comment a full Environmental Impact Statement. The EIS should more carefully analyze impacts on vessel passengers and on communities and islands served by ferries. Once a Draft Environmental Impact Statement is prepared, NOAA should convene at least two public hearings in the Northeast and Southeast.

Commercial whalewatching vessels should be exempted from the speed limit if they undertake alternative measures to protect whales

PVA includes within its membership 12 companies that operate commercial whalewatching voyages on the U.S. East Coast. These include three in Maine, five in Massachusetts, two in New York, and two in New Jersey. There are other commercial whalewatching operators on the East Coast that are not members of the Passenger Vessel Association.

All commercial whalewatching companies on the East Coast fall within the category of a small business as set by the U.S. Small Business Administration. Nevertheless, they are important economically. A November study issued by NOAA's Office of Marine Sanctuaries (entitled "Whale Watching in Stellwagen Bank National Marine Sanctuary: Understanding Passengers and their Economic Contributions") found that six commercial whalewatching companies reported carrying more than 347,000 passengers each year to the national marine sanctuary and adjacent waters. It further stated, "Whale watching contributes $182 million in output, $107 million in value added, $76 million in income, and 1,400 full- and part-time jobs to the local economy." Also, NOAA has posted on a website a Socioeconomic Fact Sheet for the national marine sanctuary that states: "Virtually all of Massachusetts whale watching occurs in Stellwagen Bank National Marine Sanctuary, one of the top-ten premiere whale watching locations in the world, as identified by *USA Today*. A study completed in 2000 [*note—more than 20 years ago!*] estimated that Massachusetts alone accounted for nearly 80 percent of New England whale watching tour totals in passengers and revenues, generating $24 million per year.

Whalewatching vessel operators differ from all other vessel operators (commercial and recreational) in one critical aspect—their business model and reason for existence is to seek out marine mammals of all species, thereby enabling their passengers to observe and learn about them. On a commercial whalewatching vessel, not only are the captain and members of the crew actively looking for whales, so are the dozens or hundreds of passengers! Furthermore, crew members are trained to know the characteristics of whale so as to identify the species by sight and behavior. The chances of a commercial whalewatching vessel failing to observe a right whale and unknowingly striking it are infinitesimally small. In fact, examining NOAA's data, it doesn't appear that a commercial whalewatching vessel has ever struck a right whale since the inception of the 2008 vessel speed limit rule.

Whalewatching vessels attract many customers that book their trips days or even weeks in advance. If a Dynamic Speed Zone is imposed on a vessel's route with little or no advance notice, the impact of the vessel's operations can be severe. Rather than accept a voyage of considerably longer duration, passengers may wish to be

re-booked to a future beyond the period of the DSZ (assuming that it fits their schedule) or they may cancel altogether and demand refunds of any funds paid in advance.

Given these facts, the Passenger Vessel Association urges that NOAA amend the proposed rule to exempt from the 10-knot speed limit requirement a commercial whalewatching vessel under the following circumstances:

- the vessel must be actively participating in NOAA's WhaleSense program;
- the vessel must at all times have one or more knowledgeable crew members actively serving as observers to look out for right whales. Perhaps NOAA or its designee could implement a training and certification program for such observers—if so, the presence of a certified observer would be required;
- the vessel must adhere to the existing requirement to stay at least 500 yards away from the right whale; and
- if the vessel's crew identifies or suspect the presence of a right whale, the vessel would be required to slow to 10 knots for an appropriate period of time.

Changes to the proposed rule can greatly ease adverse impacts on ferry vessels, their passengers, and the communities and islands that they serve

PVA's membership includes operators of ferry vessels from North Carolina to Maine. Some ferry systems are operated by state and other governmental agencies. Other ferry routes (for example, across Long Island Sound and Cape Cod Bay) are served by private companies.

It is disappointing that NOAA failed to consult the Bureau of Transportation Statistic's National Census of Ferry Operators. See https://www.bts.gov/NCFO. None of the documents associated with the proposed rule make reference to this valuable resource. Updated regularly after a census performed every two years, it is the most comprehensive source of information about the nation's ferry companies, vessels, routes, and characteristics.

NOAA's materials have no suggestion that a ferry vessel of 65 feet or more in length has struck a right whale during the 15 years during which the existing vessel speed limit rule has been in force. However, the Atlantic Speed Zone of the proposed rule will definitely impose 10-knot speed limits on ferry vessels for more than half of the year. It is also possible that Dynamic Speed Zones could be declared on ferry routes from Maine to Florida.

Some ferry operators operate specialized high-speed passenger vessels, traveling at 25 knots or more. Imposition of a 10-knot speed limit will eliminate a high-speed ferry's competitive advantage compared to a ferry vessel of more traditional speed.

Even a traditional-speed ferry typically sails at more than 10 knots. If it must adhere to a 10-knot speed limit, whether because it operates within the Atlantic Seasonal Speed Zone or because a Dynamic Speed Zone has been imposed on its route, its travel time per trip will increase, often dramatically. The ferry operator will either have to reduce the number of daily trips or incur substantially higher labor and other costs in order to operate more hours of the day to maintain their expected number of voyages.

Incidentally, at no point in the various documents filed to accompany the proposed rule is there any discussion of the likely impact that longer-duration trips will have on ferry passengers or the communities served by the ferries. This is a glaring omission in NOAA's examination of the effect of the proposed rule.

Most (but not all) negative impacts on ferries can be eased by:

- adjusting the Atlantic Seasonal Speed Zone so that it does not embrace bays and estuaries on the mainland side of offshore island and instead having it begin on the seaward sides of the islands;
- altering the Dynamic Speed Zone provision so that DMZs would not be declared in these nearshore waters (see further discussion below);
- as discussed later, lifting the speed limit in Cape Cod Bay on May 15, as in the current rule.

The Atlantic Speed Zone should not include certain nearshore bodies of water

The proposed rule, if approved, will establish several Seasonal Speed Zones. The Atlantic Speed Zone is the area of vessel operations for nearly all of the affected members of the Passenger Vessel Association. The South Carolina Speed Zone (and perhaps the North Carolina Speed Zone) is the area of vessel operation of a single

member of the PVA (a company that offers gaming cruises in international waters three miles from shore).

Island communities from Maine to North Carolina depend upon ferries operated by public and private operators. Not only are these ferries the primary method by which residents and visitors (and their vehicles) travel between the islands and the mainland, they also transport essentials such as food, fuel, medical supplies, etc. Nearly all of these ferries operate pursuant to fixed schedules, and the vessels typically travel at speeds above 10 knots. However, with the exception of ferries traveling across Cape Cod Bay to Provincetown, Massachusetts, the existing rule's Seasonal Management Areas do not overlap with the ferry routes to Fire Island, Martha's Vineyard, Nantucket Island, Block Island, and more. Even in Cape Cod Bay, the lifting of the SMA and its 10-knot speed limit as of May 15 each year means that the bulk of the season for ferry traffic is not affected by the speed limit.

This situation would change dramatically should the proposed rule be approved in its current form. The proposed Atlantic Speed Zone would impact nearly all of the ferry routes described above.

PVA ferry operators serving these routes report that they know of no instances of right whales being observed, much less being struck. PVA's review of NOAA's data showing right whale occurrences leads to the conclusion that the animals are not typically found in these locations.

To address the negative impact on essential ferry routes and the passengers and communities served by them, the proposed rule should be amended to ensure that the Atlantic Speed Zone does not include Raritan Bay, Upper and Lower New York Bay, Jamaica Bay, the Great South Bay out to Fire Island, Long Island Sound, Fishers Island Sound, Rhode Island Sound, Narragansett Bay, Vineyard Sound, Nantucket Sound, and Buzzards Bay.

Dynamic Speed Zones should not be declared in certain nearshore bodies of water, nor should they extend onto and across landmasses

NOAA should amend the proposed rule to eliminate the possibility that a Dynamic Speed Zone is declared in Albemarle, Pamlico, and other North Carolina Sounds; Chesapeake Bay and Hampton Roads; Delaware Bay; Raritan Bay; Upper and Lower New York Bay; Jamaica Bay; Great South Bay out to Fire Island; Long Island Sound; Fishers Island Sound; Rhode Island Sound; Narragansett Bay; Vineyard Sound; Nantucket Sound; Buzzards Bay; Casco Bay; and other waters out to offshore islands served by ferries in Maine.

A review of the map of the Dynamic Management Areas and Slow Zones declared in 2021 (Figure 2 of Appendix 9.B of the Draft Environmental Assessment at page 10) makes clear that only a few of the DMAs covered these nearshore bodies of water. It is highly improbable that right whales will enter these waters, thereby making the declaration of a Dynamic Speed Zone in them a rare event. Nonetheless, even if such a possibility is remote, the consequences for the ferry operators and the island communities that they serve would be severe. Please refer to the comments filed by the Steamship Authority and Interstate Navigation of Rhode Island for a fuller description of these detrimental disruptions of ferry schedules.

The proposed rule should be amended so that only those waters seaward of the North Carolina Outer Banks, the mouth of Delaware Bay, New York Harbor, Fire Island, Block Island, Martha's Vineyard, Nantucket Island, and certain Maine islands will be potentially subject to the declaration of a Dynamic Speed Zone.

The final rule should be amended to make clear that a Dynamic Speed Zone does not embrace islands, peninsulas, or other land bodies, and does not extend into waters on the other side of these land masses from which the right whales have been located.

The map of the Dynamic Management Areas and Slow Zones declared in 2021 (Figure 2 of Appendix 9.B of the Draft Environmental Assessment) shows that a few of them appear to have covered land masses (North Carolina Outer Banks, Fire Island, Cape Cod) and then intrude upon waters on the other side of the land masses. This makes no sense, as the whales cannot travel across the land into the opposite side waters.

In Cape Cod Bay, the 10-knot speed limit should be lifted on May 15, as in the current rule

Ferry operators that traverse Cape Cod Bay serving Provincetown, Massachusetts, conformed to the existing vessel speed limit rule when it went into effect by simply eliminating their prior service that occurred before May 15. This compliance came with a financial cost to the companies. For example, see the description of this impact in the comment filed by Bay State Cruise Company.

The proposed rule will extend the temporal period for the 10-knot speed limit in all of the Atlantic Speed Zone, including in Cape Cod Bay, from May 15 to May 31. This change will cover the extended Memorial Day weekend. It will be infeasible for a ferry operator to offer service during this extended time because the travel time will increase so much that passengers will not patronize the ferry. See the explanation filed by Bay State Cruise Company. Not only will this deprive the passengers of the option of ferry service, it will also impact the business and tourist industries of Provincetown during this important holiday. It will also financially harm the ferry companies.

As there is no or little evidence that right whales remain in Cape Cod Bay past May 15, the proposed rule should be amended so that the May 15 termination date for the 10-knot speed limit should be retained, as least for Cape Cod Bay.

Recommendations by the Passenger Vessel Association

- Before finalizing the proposed rule, NOAA must prepare a full Environmental Impact Statement and conduct at least two public hearings;
- The revised rule should provide an exemption from the 10-knot vessel speed limit requirement for a commercial whalewatching vessel that adheres to certain mandates;
- NOAA should remove from the Atlantic Speed Zone waters of certain bays and estuaries between the mainland and certain islands such as Fire Island, Block Island, Martha's Vineyard, Nantucket, etc.;
- The revised rule should retain the existing May 15 date for lifting the 10-knot vessel speed limit in Cape Cod Bay, Stellwagen Bank National Marine Sanctuary, and adjacent waters;
- NOAA should alter the provisions for Dynamic Speed Zones so that they cannot be declared for bodies of water such as North Carolina's sounds, Delaware Bay, Chesapeake Bay, Long Island Sound, Fire Island Sound, etc.;
- The revised rule should be changed so that Dynamic Speed Zones do not extend over landmasses and the waters opposite from where right whales are identified;
- The proposed language for Dynamic Speed Zones should be amended to enable NOAA to lift the designation more quickly than the proposed 10 days minimum duration if the agency determines that the whales have moved away;
- NOAA should create a program overseen by NOAA or its designee whereby vessel crew members can be instructed in right whale identification, detection, and avoidance with the issuance of a certification upon completion; and
- The federal government should create a program whereby NOAA can communicate directly with participating mariners and companies regarding the location right whales by means of email, text, apps, etc.

The Passenger Vessel Association appreciates the opportunity to submit this statement for the record in response to the Subcommittee's hearing. PVA stands ready to consult with the Subcommittee as desired to elaborate on any of the points of this document and to devise solutions that protect right whales while preserving passenger vessel operations.

Submissions for the Record by Rep. Huffman

Statement for the Record

On behalf of 19 environmental organizations listed below

Thank you, Chair Bentz, Ranking Member Huffman, and members of the Subcommittee for this opportunity to submit testimony related to the North Atlantic right whale (herein "right whale") proposed Vessel Speed Rule. Vessel strikes and fishing gear entanglement are the two leading causes for the ongoing rapid collapse of the North Atlantic right whale population.[1] Vessel strikes cause close to half of all documented right whale deaths, with five reported vessel strikes resulting in mortalities or serious injuries of right whales since 2020 alone.[2] We are strongly in favor of these improvements from the previous rule and ask that you support these common sense changes that are the best tool for reducing death and injury to right whales from being struck by vessels.

The 2022 proposed rule is based on the best available science and evidence, and these National Marine Fisheries Service (NMFS) regulations required under federal will give this species a fighting chance for survival. Among other key federal laws related to right whales, the Endangered Species Act (ESA) was intended to allow federal agencies to issue rules that carry out the ESA's primary purpose of protecting endangered species. And the Marine Mammal Protection Act's (MMPA) "major objective" is to stop marine mammal populations from declining and ensure that they remain a functioning part of their marine ecosystems.[3] For both statutes, NMFS is the lead agency tasked with issuing regulations on marine mammals, including right whales.[4] The agency is obligated to act based on the best available science and evidence, and its Congressionally-mandated authority, to protect this entire species from injury, death, and potentially extinction in this case.

On August 1, 2022, the NMFS released a proposed Vessel Speed Rule that aims to reduce the risk of vessel strikes to critically endangered North Atlantic right whales.[5] Right whales have been listed as endangered since 1970 and are currently classified as critically endangered according to the International Union for Conservation of Nature.[6] The species has been in nonstop decline for over a decade, with only about 340 individual right whales remaining today.[7]

Collisions with vessels are one of the two leading causes of injury and death for right whales. At high speeds, vessels cannot safely maneuver to avoid right whales, leaving insufficient time for vessel operators and whales to avoid a collision. Because they do not have a dorsal fin, and they spend much of their time at shallow depths, right whales are particularly susceptible to collisions with vessels.[8] Since 2017, there have been 16 likely vessel strikes causing whale mortalities or serious injuries.[9] The true impact of vessel strikes on right whales may be much higher, as scientists estimate that observed deaths only represent around one third of total right whale mortalities.[10]

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[1] S.M. Sharp et al., Gross and Histopathologic Diagnoses From North Atlantic Right Whale *Eubalaena glacialis* Mortalities Between 2003 and 2018, 135 Diseases of Aquatic Organisms 1, at 1 (2019). https://www.intres.com/articles/feature/d135p001.pdf (July 3, 2019).

[2] Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46,921 at 46928 (August 1,2022); S.M. Sharp *et al., Gross and Histopathologic Diagnoses From North Atlantic Right Whale Eubalaena glacialis Mortalities Between 2003 and 2018*, 135 Diseases of Aquatic Organisms 1, at 1.

[3] 16 U.S.C. § 1531(c)(1); 16 U.S.C. § 1361(6)

[4] *Id*. § 1361(2).

[5] International Union for Conservation of Nature Red List categories and criteria, version 3.1, IUCN Species Survival Commission (SSC) available at https://portals.iucn.org/library/node/7977 (Last accessed March 6, 2023)

[6] *Id.*

[7] North Atlantic right whales' downward trend continues as updates population numbers released (October 24, 2022) *New England Aquarium* https://www.neaq.org/about-us/news-media/press-kit/press-releases/north-atlantic-right-whales-downward-trend-continues-as-updated-population-numbers-released/.

[8] Julia A. Dombroski, Susan E. Parks, & Douglas P. Nowacek, Dive behavior of North Atlantic right whales on the calving ground in the Southeast USA: implications for conservation, 46 ENDANG. SPECIS. RSCH., at 43 (2021)

[9] 2017–2023 North Atlantic Right Whale Unusual Mortality Event (n.d.) *NOAA Fisheries*. https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event

[10] Pace, R., Williams, R., Kraus, S.D., et al. (2021) Cryptic mortality of North Atlantic right whales, *Conservation Science and Practice*. 3(2) *available at* https://doi.org/10.1111/csp2.346

The proposed rule outlines updates to the current rule that was promulgated in 2008. The proposed changes to the rule include expanding the vessels covered by the rule with the addition of vessels 35 feet or greater in length (compared to the previous 65 feet), expanding the network of Seasonal Management Areas (called Seasonal Speed Zones in the proposed role) to key areas for right whales based on updated information, and upgrading current voluntary speed zones to mandatory in areas where whales are seen. The main areas where the whales are found are busy commercial and recreational vessel traffic areas along the East Coast.

While our organizations support the proposed rule, there is room for improvement in an even stronger final rule on vessel speed regulations for the U.S. Atlantic. The agency could improve the rule by removing exemptions for government vessels, requiring use of Automatic Identification System (AIS) devices for vessel tracking, and improving enforcement of speed limits.

The current vessel speed regulations only apply to vessels 65 feet or greater in length. However, boats of all sizes can cause fatal injuries to right whales. As the agency points out in the proposed rule, there have been four reported strikes from 2020 to August 2022. Three out of the four involved vessels were traveling more than 20 knots at the time.[11] Of the 12 known right whale-vessel collisions in U.S. waters between 2013 and 2021, at least eight of the vessels involved were confirmed or suspected to have been under 65 feet in length, demonstrating the deadly risk of smaller vessels to right whales.[12] And there have been additional likely deaths from vessel strikes since 2021. In February 2021, a calf died from propeller wounds, broken ribs, and a fractured skull after a collision with a 54-foot recreational fishing vessel that was not subject to the speed requirements. Although the captain was not operating illegally, this collision caused not only the tragic loss of a critically endangered whale, but also resulted in sinking the $1.2 million vessel and endangering all passengers on board.[13]

With so few whales left, every vessel strike is detrimental to the potential recovery of this species. In fact, NMFS has determined that less than one right whale can die from anthropogenic causes per year for the species to reach its optimum sustainable population.[14]

Should a collision occur, studies have found that slowing vessel speeds to 10 knots reduces their risk of death from vessel strikes by 80% to 90%. Slowing vessels down in key areas and times is currently the most effective management tool for reducing vessel strikes. Additionally, the experience and careful tendencies of mariners are not enough to reduce risks to marine mammals. A 2016 study showed that even trained observers and ideal conditions cannot properly protect right whales against vessel strikes.[15] By expanding the regulation to include boats between 35 and 65 feet in length, bolstering slow zones, and more, right whales will be better protected from these potentially fatal interactions.

Since the release of the proposed rule, there has been pushback from the recreational boating and fishing industries, as well as the pilot operator sector, citing concerns of safety and economic harm. NMFS recognizes that mariner safety is extremely important and has included safety deviation provisions since the initial rule in 2008. The new proposed rule only improves these provisions, including expansion of exceptions to include emergency situations that present a threat to the health, safety, or life of a person; allowing vessels under 65 feet in length to transit at speeds greater than 10 knots when certain weather conditions are detected; and updated reporting protocols. Overall, the proposed regulatory changes continue to emphasize mariner safety as well as preventing right whale injury and mortality.

When discussing the economic impact of this rule, some groups have claimed that this new rule would have significant economic impacts. However, the proposed seasonal speed zones would only impact boat traffic for the months of the year when

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[11] Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule at 46298.

[12] Whale and Dolphin Conservation, Defenders of Wildlife, Conservation Law Foundation, and Center for Biological Diversity v. National Marine Fisheries Service and Wilbur Ross (2021) *available at* https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/WDC-v-NMFS-right-whale-vessel-strike-unreasonable-delay-complaint.pdf (Last accessed June 6, 2023).

[13] "Looking Back: Capt. Recalls Whale Collision," Georgia Department of Natural Resources (2/11/2022) *available at* https://georgiawildlife.blog/2022/02/11/looking-back-capt-recalls-whale-collision/.

[14] National Marine Fisheries Service (NMFS) 2021. Draft U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment *available at* https://www.fisheries.noaa.gov/action/2021-draft-marine-mammal-stock-assessment-reports

[15] Wiley, D.N., C.A. Mayo, E.M. Maloney, and M.J. Moore. 2016. Vessel strike mitigation lessons from direct observations involving two collisions between noncommercial vessels and North Atlantic right whales (*Eubalaena glacialis*). Marine Mammal Science 32(4):1501–1509.

the whales are in the affected area. It is absolutely vital to slow down vessels when mothers and calves are migrating in the Southeast during calving season and when the whales are aggregating in New England. And many of these seasonal slow zones fall outside of the heart of boating and recreational fishing seasons. While implementing speed limits on recreational vessels may add some travel time to trips, these zones do not prohibit fishing, boating, or other activities and still allow mariners to utilize the areas.

Saving this species from extinction will take a collective effort from the fishing, boating, and shipping industries to effectively reduce the risk of deadly collisions. The federal government has an obligation to protect these whales from this clear threat by implementing stronger regulations and enforcement procedures.

Thank you again for the opportunity to submit this testimony,

Animal Welfare Institute

Center for Biological Diversity

Cetacean Society International

Conservation Law Foundation

Defenders of Wildlife

Earthjustice

Endangered Species Coalition

Environment America

Environmental Investigation Agency

International Fund for Animal Welfare

International Marine Mammal Project of Earth Island Institute

Natural Resources Defense Council

Oceana

Oceanic Preservation Society

Whale and Dolphin Conservation (WDC)

Sanctuary Education Advisory Specialists (SEAS)

Southern Environmental Law Center (SELC)

Wildlife Conservation Society

World Wildlife Fund

Southern Environmental Law Center
Washington, DC

June 14, 2023

Hon. Cliff Bentz, Chairman
Hon. Jared Huffman, Ranking Member
House Committee on Natural Resources
Subcommittee on Water, Wildlife and Fisheries
1324 Longworth House Office Building
Washington, DC 20515

Dear Chair Bentz and Ranking Member Huffman:

The Southern Environmental Law Center ("SELC") submits this statement to the House Natural Resources Committee's Water, Wildlife, and Fisheries Subcommittee regarding its June 6, 2023 oversight hearing, Examining the Impacts of the National Oceanic and Atmospheric Administration's Proposed Changes to the North Atlantic Right Whale Vessel Strike Reduction Rule. As an organization working to protect the wildlife and natural resources of the Southeast, we write to reiterate our strong support for the "Proposed Rule" to amend the 2008 North Atlantic Right Whale Vessel Strike Reduction Rule ("Vessel Speed Rule"), 87 Fed. Reg. 46,921 (Aug. 1, 2022), and to provide additional information to be considered by the Subcommittee.

North Atlantic right whales are rapidly declining toward extinction, with only about 340 individuals remaining in the population, including fewer than 70 reproductive females.[1] The population has been in decline since 2010 due to increased human-caused mortality and decreased reproduction, coinciding with climate-change driven shifts in right whale distribution.[2] Anthropogenic trauma is the leading cause of death for right whales.[3] Outside their first year of life, natural death of a right whale has not been observed in the last two decades because they succumb to human-caused mortality before they can die of old age or other natural causes.[4] The population is now sufficiently small that it cannot sustain the loss of even *one* whale per year to human causes.[5]

Collisions with vessels are one of the two leading causes of injury and death for right whales. Right whales are particularly prone to vessel strikes, given their slow speeds, extended time spent at or near the surface, and primary habitat overlapping highly trafficked coastal waters.[6] Calves, juveniles, and females, which are essential to the future viability of the population, are disproportionately vulnerable to vessel strikes.[7] Since 2017, vessels have killed, seriously injured, or sub-lethally impacted

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[1] Heather M. Pettis et al., *North Atlantic Right Whale Consortium 2022 Annual Report Card*, N. Atl. Right Whale Consortium (Feb. 2023), *available at* https://www.narwc.org/report-cards.html, at 1.

[2] Richard M. Pace, III et al., *State-space mark-recapture estimates reveal a recent decline in abundance of North Atlantic right whales*, Ecology & Evolution (Sept. 18, 2017); Sarah M. Sharp et al., *Gross and histopathologic diagnoses from North Atlantic right whale Eubalaena glacialis mortalities between 2003 and 2018*, Diseases of Aquatic Organisms (June 20, 2019); Nicholas R. Record et al., *Rapid climate-driven circulation changes threaten conservation of endangered North Atlantic right whales*, Oceanography (June 2019); Erin L. Meyer-Gutbrod et al., *Marine species range shifts necessitate advanced policy planning: The case of the North Atlantic right whale*, Oceanography (June 11, 2018).

[3] Peter Corkeron et al., *The recovery of North Atlantic right whales, Eubalaena glacialis, has been constrained by human-caused mortality*, Royal Soc'y Open Sci. (Nov. 7, 2018); Sharp et al., *supra* note 2.

[4] Nat'l Marine Fisheries Serv. (NMFS), Draft Environmental Assessment for Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (July 2022), *available at* https://www.fisheries.noaa.gov/action/amendments-north-atlantic-right-whale-vessel-strike-reduction-rule [hereinafter "Draft EA"], at 12.

[5] Sean A. Hayes et al., *U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments—2021*, NMFS (May 2022), *available at* https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports, at 23 (showing the Potential Biological Removal at 0.7).

[6] *See* Susan E. Parks et al., *Dangerous dining: Surface foraging of North Atlantic right whales increases risk of vessel collisions*, Biology Letters (Aug. 3, 2011).

[7] Dana A. Cusano et al., *Implementing conservation measures for the North Atlantic right whale: Considering the behavioral ontogeny of mother-calf pairs*, Animal Conservation (Oct. 19, 2018).

16 right whales, an average of about three per year.[8] However, research shows that actual mortality and serious injury rates are likely more than *three times higher*, as more than two-thirds of right whale deaths go undetected.[9] At a time when the population cannot stand to lose even one whale per year to human causes, these numbers plainly demonstrate that without addressing this threat, the species faces a real prospect of extinction.

On August 1, 2022, the National Marine Fisheries Service ("NMFS") released a much-needed Proposed Rule that aims to substantially reduce the risk of vessel strikes to right whales, 87 Fed. Reg. 46,921. Unfortunately, since the release of the Proposed Rule, misinformation about these changes has proliferated, citing incorrect data about the impacts to the recreational boating and fishing industries, as well as the pilot operator sector. It is important to correct these inaccuracies which are putting the implementation of these important protections at risk.

Myth: The Proposed Rule is not necessary and would not help save right whales.

The scientific community is in unanimous agreement that without urgent action to stop mortalities from both vessel strikes and fishing gear entanglements, right whales will be functionally extinct in our lifetime. The right whale population cannot sustain the loss of one whale per year to human causes; yet annual mortalities and serious injuries from vessel strikes alone consistently exceed this level. To make matters worse, in the last three years, three calves and one nursing mother have been lost to vessel strikes.[10] Despite the grim situation, there is strong evidence that recovery is attainable. Right whales have been rescued from the brink before: after being hunted to near extinction in the 1900s, the population saw two decades of growth between 1990 and 2010.[11] Put simply, these measures are essential to once again prevent the collapse of the right whale population.

While NMFS's 2008 Vessel Speed Rule represented a significant step in reducing deadly vessel strikes, the best available science now shows that it must be expanded to help bring serious injuries and mortalities to a sustainable level. The Proposed Rule is based on years of extensive, sound scientific analysis and, if adopted, would address *90 percent* of fatal and injurious vessel strike risk for right whales.[12] For example, the proposed change to include vessels 35 feet and longer is long overdue and reflects years of data demonstrating the known risk smaller vessels pose to right whales, 87 Fed. Reg. at 46,928. The three most recent known incidents of vessel collisions with calves all involved vessels either confirmed or suspected to be smaller than 65 ft long. *Id*. Although the risk of striking a right whale may seem low to an individual boater, the risk to each right whale is dangerously high. With so few whales left, every vessel strike is detrimental to the potential recovery of this species.

Myth: The Proposed Rule would decimate coastal economies and severely restrict ocean access.

Public perceptions of the economic impacts of the Proposed Rule have been dramatically inflated. Contrary to misinformation, the Proposed Rule is still limited in when, where, where, and to what vessels it will apply. First, the proposed *seasonal* speed zones would only impact boat traffic during months when right whales are known to be at elevated risk. 87 Fed. Reg. at 46,931. For the majority of the East Coast, this applies only to winter months, which fortunately coincide with most "off-seasons for recreational boating. *Id*. These measures are vital to protect right whales during their calving season in the Southeast, their migration season in the Mid-Atlantic, and their foraging season in New England. Second, the Proposed Rule only extends 20–30 nautical miles from shore along most of the East Coast, well below the distance that is required for many offshore recreational fishing trips. *Id*.

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[8] NMFS, *2017–2023 North Atlantic Right Whale Unusual Mortality Event* (last visited May 31, 2023), https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event.

[9] Richard M. Pace, III et al., *Cryptic mortality of North Atlantic right whales*, Conservation Sci. & Practice (Feb. 2, 2021).

[10] *Dead North Atlantic Right Whale Sighted off New Jersey*, NMFS (June 29, 2020), https://www.fisheries.noaa.gov/feature-story/dead-north-atlantic-right-whale-sighted-new-jersey; *North Atlantic Right Whale Calf Injured by Vessel Strike*, NMFS (Jan. 13, 2020), https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-injured-vessel-strike; *North Atlantic Right Whale Calf Stranded Dead in Florida*, NMFS (Feb. 14, 2021), https://www.fisheries.noaa.gov/feature-story/north-atlantic-right-whale-calf-stranded-dead-florida.

[11] Richard M. Pace, III et al., *supra* note 2.

[12] Draft EA at 18.

While these measures may add some travel time to trips, these zones do not prohibit fishing, boating, or any other activities. Third, the Proposed Rule only covers vessels down to 35 feet and longer—a small segment of the overall boating population. The thousands of boats that are shorter than 35 feet will not be subject to any new speed limits.

Myth: The Proposed Rule would threaten mariner safety and put human life at risk.

NMFS has long valued the importance of mariner safety when crafting its Vessel Speed Rule. In 2008, the agency incorporated myriad safety provisions into the initial rule, and in fact found that boating safety *increased* after the rule went into effect.[13] The Proposed Rule does not change any of those provisions, and in fact strengthens them, by expanding the types of exemptions for emergency situations such as inclement weather, as well as updating reporting protocols. 87 Fed. Reg. at 46,930. The Proposed Rule continues to prioritize human safety while increasing species protections, meaning that whale safety and mariner safety can continue to co-exist.

Myth: There are alternatives available to protect right whales from vessel strikes.

While opponents are quick to critique the Proposed Rule, they offer few realistic solutions to these critiques, if any at all. The fact is, short of eliminating vessels from an area, slowing vessel speeds is the most effective strategy available to prevent vessel collisions with right whales in U.S. waters. Slowing speeds to 10 knots or less reduces the risk of serious injury and mortality from vessel collisions by 80 to 90 percent.[14] In addition to reducing the severity of impact, slow speeds reduce the probability of a collision by allowing both vessels and whales more maneuverability to avoid one another.[15]

There are currently no technological alternatives that are proven effective as vessel speed limits. Unlike other large whale species, right whales are notoriously difficult to visually detect on the water due to their lack of dorsal fin and extended time spent at sub-surface depth. Studies show that even the most trained observers in perfect conditions cannot spot right whales 100 percent of the time.[16] In addition, unlike other large species like sharks, right whales cannot be permanently tagged and tracked in real time to avoid vessel collisions. While future possibilities for near real-time technologies show promise, unfortunately without these available, even the experience and careful tendencies of mariners are not enough to reduce vessel strike risk to right whales.

Myth: NOAA did not consult with affected stakeholders before issuing the Proposed Rule.

Past rulemakings as far back as 2006 show that NMFS has been publicly considering and soliciting feedback from the regulated community on plans to regulate smaller vessels over larger areas for decades. 73 Fed. Reg. 60,173 (Oct. 10, 2008), 78 Fed. Reg. 73,726 (Dec. 9, 2013). Most recently, in 2021, the agency solicited public comment on a Vessel Speed Rule Assessment which included, among other things, scientific evidence showing that expansions of speed zone areas and regulated vessel classes were necessary to protect right whales from ongoing deaths and serious injuries from vessel collisions.[17] NMFS is presently considering public comments on the Proposed Rule, in accordance with all proper policies.

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[13] NMFS, North Atlantic Right Whale (*Eubalaena Glacialis*) Vessel Speed Rule Assessment (June 2020), *available at* https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales [hereinafter "2021 Vessel Speed Rule Assessment"], at 20.

[14] *See, e.g.*, Gregory K. Silber et al., *Hydrodynamics of a ship/whale collision*, J. Experimental Marine Biology & Ecology (Aug. 2010); Angela S.M. Vanderlaan & Christopher T. Taggart, *Vessel collisions with whales: The probability of lethal injury based on vessel speed*, Marine Mammal Sci. (Dec. 21, 2006); Paul B. Conn & Gregory K. Silber, *Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales*, Ecosphere (Apr. 3, 2013); Julien Martin et al., *A quantitative framework for investigating risk of deadly collisions between marine wildlife and boats*, Methods in Ecology & Evolution (July 27, 2015).

[15] Scott M. Gende et al., *A Bayesian approach for understanding the role of ship speed in whale-ship encounters*, Ecological Applications (Sept. 1, 2011); Conn & Silber, *id*.

[16] David N. Wiley et al., *Vessel strike mitigation lessons from direct observations involving two collisions between noncommercial vessels and North Atlantic right whales (Eubalaena glacialis)*, Marine Mammal Sci. (July 2016).

[17] 2021 Vessel Speed Rule Assessment, supra note 13.

In conclusion, we strongly support the Proposed Rule, which would give right whales a fighting chance for survival and recovery. Saving this species from extinction will take a collective effort from the fishing, boating, and shipping industries to effectively reduce the risk of deadly vessel collisions. The federal government has an obligation to protect these whales from this clear threat by implementing stronger regulations and enforcement procedures.

Sincerely,

Anders Reynolds,
Federal Legislative Director

Melissa L. Edmonds,
Science & Policy Analyst

June 6, 2023

Hon. Cliff Bentz, Chairman
Hon. Jared Huffman, Ranking Member
House Committee on Natural Resources
Subcommittee on Water, Wildlife and Fisheries
1324 Longworth House Office Building
Washington, DC 20515

Dear Chair Bentz and Ranking Member Huffman:

Our groups are writing to you and members of the Subcommittee to voice our support for the much-needed 2022 proposed changes to the North Atlantic right whale ("right whale") vessel speed regulations issued back in 2008. We are strongly in favor of these improvements from the previous rule and ask that you support these common sense changes that are the best tool for reducing death and injury to right whales from being struck by vessels.[1]

The species has been in nonstop decline for over a decade, with only about 340 right whales remaining.[2] Collisions with vessels are one of the two leading causes of injury and death for the North Atlantic right whale. The 2008 vessel speed rule was promulgated to establish speed limits for vessels 65 feet or greater in length in seasonal areas along the right whale's migration route. Although the 2008 rule helped decrease vessel strike mortalities,[3] it is insufficiently protective based on updated information on where right whales are found and where threats are greatest. The agency's data on vessel activity and right whale distribution has been updated with essential changes that informed the 2022 rule. The expansions of the seasonal zones now more closely overlap with the location of right whales.

The National Oceanic and Atmospheric Administration (NOAA) has found 16 likely vessel strikes just since 2017, the beginning of the current and ongoing Unusual Mortality Event in 2017.[4] Additionally, known right whale deaths likely only represent about one-third of actual right whale deaths because the majority go unobserved or unreported.[5] Each human-caused North Atlantic right whale death exceeds the level that federal government scientists have determined would allow this species to recover.[6]

In the proposed rulemaking, NMFS is updating the current 2008 rule in several crucial ways. The agency is proposing the expansion of seasonal slow zones and adjusting their timing to account for areas where these whales are found and the risk of being struck by a vessel is highest. As they stand, the revised regulations would also increase the number of vessels covered by speed limits. While the current rule covers vessels 65 feet or greater in length, the proposed revisions would apply to vessels 35 feet or greater. The agency based this analysis on known instances of vessels striking large whales and current scientific consensus on risk to whales from

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[1] The National Marine Fisheries Service should also consider requiring vessels covered by this rule to carry and continuously transmit Automatic Identification System (AIS) devices for public vessel tracking, improving monitoring and enforcement of speed limits, designate Dynamic Speed Zones (DSZs) following the visual confirmation of a single North Atlantic right whale, and including an exemption for permitted disentanglement vessels who are actively engaged in a response.

[2] North Atlantic right whales' downward trend continues as updates population numbers released (October 24, 2022) *New England Aquarium*. https://www.neaq.org/about-us/news-media/press-kit/press-releases/north-atlantic-right-whales-downward-trend-continues-as-updated-population-numbers-released/ (Last accessed June 6, 2023).

[3] Nat'l Oceanic and Atmospheric Admin., Nat'l Marine Fisheries Service, Office of Protected Resources, North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment—June 2020.

[4] Nat'l Oceanic and Atmospheric Admin., Nat'l Marine Fisheries Service, "2017–2023 North Atlantic Right Whale Unusual Mortality Event" *available at* https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event (Last accessed June 6, 2023).

[5] Pace, R.M., R. Williams, S.D. Kraus, A.R. Knowlton, and H.M. Pettis. 2021. Cryptic mortality of North Atlantic right whales. Conservation Science and Practice 3(2):e346; NOAA Fisheries, Stock Assessment Report for North Atlantic Right Whale (*Eubalaena glacialis*): Western Atlantic Stock (2021) *available at* https://media.fisheries.noaa.gov/2022-08/N%20Atl%20Right%20Whale-West%20Atl%20Stock_SAR%202021.pdf

[6] Pettis, H.M., Pace, R.M. III, Hamilton, P.K. 2022. North Atlantic Right Whale Consortium Annual Report Cards 2006–2021. Report to the North Atlantic Right Whale Consortium *available at* https://www.rightwhalec.org/report-cards.html

vessel strikes. Studies have found that slowing vessel speeds to 10 knots reduces a North Atlantic right whale's risk of death from vessel strikes by 80 to 90 percent.[7]

The agency is also proposing a new Dynamic Speed Zone framework that lays out mandatory vessel slow zones where whales are visually or acoustically detected. Previously, these dynamic slow zones were voluntary, and vessels rarely complied with them. These updates are vital to further reducing the likelihood of mortalities and serious injuries to endangered right whales from vessel collisions in areas outside of Seasonal Speed Zones. This part of the proposed rule would be further strengthened if Dynamic Speed Zones were triggered by either an acoustic detection or a visual confirmation of a *single* right whale, rather than an aggregation of three or more right whales, in order to protect mothers with calves and pregnant females. Additionally, the requirement of a 50% likelihood that whales will remain in the management area, with no area definition and no minimum length of time for the area, are potentially problematic.

Based on sound, informed decision making, the agency has said that these proposed changes "are essential to stabilize the ongoing right whale population decline and prevent the species' extinction."[8] North Atlantic right whales need strong action from the U.S. government to protect them from vessel strikes. Incorporating these additional modifications into the final vessel speed regulations, approving the final rule quickly, and allocating adequate resources for monitoring and enforcement will be vital to preventing additional deaths and protecting the species.

We look forward to your leadership on this important issue to support the recovery of this iconic species.

Sincerely,

Animal Welfare Institute
Animal Wellness Action
Association of Zoos and Aquariums
Azul
California Environmental Voters
Center for a Humane Economy
Christian Council of Delmarva
Coastal Plains Institute
Conservation Law Foundation
Endangered Habitats League
Endangered Species Coalition
Great Old Broads for Wilderness
PNW WIT
Healthy Ocean Coalition
Kettle Range Conservation Group
National Wolfwatcher Coalition
Natural Resources Defense Council
New Hampshire Audubon
NH Audubon
NY4WHALES
NYC Plover Project
Ocean Alliance
Ocean Defense Initiative
Predator Defense
Resource Renewal Institute
Sierra Club
Virginia Aquarium & Marine Science Center

[7] Laist, D.W., A.R. Knowlton, and D. Pendleton. 2014. Effectiveness of mandatory vessel speed limits for protecting North Atlantic right whales. Endangered Species Research 23(2):133–147; North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment—June 2020.

[8] "Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule," Nat'l Oceanic and Atmospheric Admin., Nat'l Marine Fisheries Service *available at* https://www.fisheries.noaa.gov/action/amendments-north-atlantic-right-whale-vessel-strike-reduction-rule (Last accessed June 6, 2023).

Heartwood
Humane Action Pennsylvania
Humane Action Pittsburgh
Inland Ocean Coalition
International Fund for Animal Welfare
Washington Wildlife First
Wildlife Conservation Society
Wolf Conservation Center
World Wildlife Fund

Still Photos from NOAA Fisheries Showing Whale Movement

The photos can be viewed on the Committee Repository at:
https://docs.house.gov/meetings/II/II13/20230606/116041/HHRG-118-II13-20230606-SD006.pdf

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