



October 31, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Gina Raimondo
Secretary, Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
1401 Constitution Ave. NW
Washington, D.C. 20230

Re: Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (87 Fed. Reg. 46921; August 1, 2022)

Dear Secretary Raimondo:

On August 1, 2022, the U.S. Department of Commerce’s National Marine Fisheries Service (NMFS) published a proposed rule titled, “Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule.”¹ The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments on the proposed rule. Both Advocacy and the small entities that consulted with Advocacy strongly agree that protection of right whales must remain a priority for all who engage in maritime activities. While these small entities are committed to finding ways to ensure that vessel strikes are minimized, this proposed rule would further restrict an already heavily regulated and compliant maritime industry. Advocacy therefore encourages NMFS to consider alternatives to the proposed rule that would meet the stated objectives of conserving right whales while minimizing the burden to affected small businesses.

¹ Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46921, (August 1, 2022).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."

B. The Proposed Rule

Under the Marine Mammal Protection Act, NMFS may promulgate regulations necessary for the conservation of a specific marine species that is in decline.⁶ Similar authority is also granted under the Endangered Species Act.⁷ Both statutes also prevent the "take" of protected species.⁸ The North Atlantic right whale (right whale) has been listed as endangered under the Endangered Species Act since 1970.⁹ According to data in NMFS' proposed rule, the right whale has been in further decline over the past decade.¹⁰ NMFS has therefore undertaken several regulatory actions

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ 16 U.S.C. § 1382 (a).

⁷ 16 U.S.C § 1540 (f).

⁸ 16 U.S.C. §1532 (19). Under the ESA "take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." *See also* 16 U.S.C. 1540 (f).

⁹ 73 Fed. Reg. 12024, (March 3, 2008).

¹⁰ *See* 87 Fed Reg. 46921 at 46922 (stating that the right whale population has been reduced to fewer than 350 whales).

to help in the conservation of the right whale. In 1997, NMFS finalized a rule that restricts boats from approaching within 500 yards of a right whale.¹¹ If a vessel does find itself within 500 yards of a right whale, the vessel is required to immediately depart from the area at a slow and safe speed in a direction away from the whale.¹²

In 2008, NMFS finalized a rule that implemented speed restrictions of no more than 10 knots for all vessels 65 feet or greater in length.¹³ The rule would impose these restrictions along the east coast at certain times and in specified areas where the whales might be present. This rule did not address any actions for ships measuring between 35-65 feet. In 2017, NMFS declared an “unusual mortality event” for the right whale due to the number of mortalities and serious injuries in the population.¹⁴ NMFS estimates that fewer than 350 right whales remain and is therefore taking increased regulatory measures to protect the species.

On August 1, 2022, NMFS published a proposed rule to impose vessel speed restrictions for vessels 35 to 65 feet in length both during certain times of the year when whales may be present, and within specific boundaries along the Atlantic coast. The rule would also modify certain existing boundaries subject to the restrictions. Among the requirements of the rule, NMFS would change the following:

- 1) Modify special boundaries and the timing of mandated seasonal management areas,¹⁵
- 2) Include vessels greater than 35 feet and less than 65 feet among the vehicle classes subject to the rule,
- 3) Implement a dynamic speed zone framework to implement speed restrictions in areas where whales are known to be found,¹⁶ and
- 4) Update safety deviation provisions.¹⁷

¹¹ North Atlantic Right Whale Protection, 62 Fed. Reg. 6729, (February 13, 1997).

¹² *Id.*

¹³ Endangered Fish and Wildlife; Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales, 73 Fed. Reg. 60173, (October 10, 2008).

¹⁴ 87 Fed. Reg. 46921. *See also* Marine Mammals, 71 Fed. Reg. 75234, (December 14, 2006). This notice codifies criteria for determining marine mammal unusual mortality events.

¹⁵ 87 Fed. Reg. 46921 at 42925. Seasonal management areas are used to restrict activities during certain seasons and in certain areas where whales are known to be present.

¹⁶ *Id.* at 46925. Dynamic speed zones would be implemented when one of the following conditions is met: (1) confirmed visual sighting of a right whale aggregation or confirmed acoustic detection; (2) area has a greater than 50 percent likelihood of right whale presence during a period of 10 days.

¹⁷ *Id.* Safety deviations include those instances in which it would be unsafe to travel at such a slow speed, such as during a weather event, unusual wave activity, medical emergency etc.

II. Advocacy's Small Business Concerns

On September 15, 2022, Advocacy held a small business roundtable to gather comments and feedback from affected small entities and their representatives.¹⁸ During the roundtable Advocacy heard from small ferry and other passenger vessel operators, sports fishermen, port pilots and guide boat businesses, boat manufacturers, and charter boat companies. While all the small businesses agreed that right whales must be protected from harm, they were concerned about NMFS' current proposal for doing so.

These businesses spoke about how stringent NMFS' proposal is, and that it will have a devastating effect on the maritime community all along the eastern seaboard. They wholeheartedly acknowledged that something must be done to protect these whales due to their ever-dwindling population. However, many felt as though this goal could be better accomplished through other mechanisms that focused on protection of the whales, rather than inhibition of maritime activities.

Stakeholders argued that it is often more dangerous for vessel operators than it is for the whales due to the smaller size of their boat and the amount of damage the boat may sustain if it strikes a whale. One small charter company indicated that their boats would suffer catastrophic damage if they were to collide with a whale, and they therefore have an additional added interest, beyond helping to conserve the species, in avoiding them. NMFS also acknowledged this danger within the proposed rule.¹⁹

One potential unintended consequence of the proposed rule would be the additional travel time various vessels would take to engage in maritime activities. Some ferry operators indicated they would have to rethink whether to continue ferry operations because trips that would normally only take a few hours may take significantly longer. The additional time may impact whether passengers choose to take those trips. In another example, a charter fishing company indicated that the proposed rule could have a devastating impact on same-day recreational fishing charter trips because the speed at which the boats would have to travel is so slow that it would be infeasible for them to complete the trip in a day. They stated that many tourists enjoy one-day charters and that this would eliminate a strong source of revenue from their businesses. One small boat dealer brings boats from the upper Northeast to Florida each year for a boat show. The trip normally takes 90 days to complete. If required to travel at 10 knots for the entire duration, the same voyage would take nearly 300 days.

Stakeholders also voiced concerns with their ability to comply with the International Maritime Organization's (IMO) guidelines for work hours if the proposed rule is finalized.²⁰ The IMO has

¹⁸ See SBA Office of Advocacy, Natural Resources Roundtable, (September 15, 2022) available at: [Natural Resources Roundtable – September 15, 2022 – SBA's Office of Advocacy](#).

¹⁹ 87 Fed. Reg. 46925 at 46928.

²⁰ See International Maritime Organization, Seafarers hours of work and rest, (last visited Oct. 27, 2022), <https://www.imo.org/en/OurWork/HumanElement/Pages/Seafarers-hours-of-work-and-rest.aspx>.

very specific guidelines for how long vessel operators should be on the water without rest. One commenter expressed concern with the ability to comply with these guidelines if their trip time was doubled because of this rule.

Finally, one attendee asked that NMFS clarify whether small businesses that operate vehicles that primarily travel above the surface of the water, such as seaplanes, would be exempt from this rule.

Advocacy recommends that NMFS explore feasible alternatives that will serve to protect the whales while mitigating the rule's impact on small businesses.

III. Advocacy's Concerns with the Rule's RFA Analysis

A. NMFS' Initial Regulatory Flexibility Act Analysis (IRFA) may underestimate the impacts of the rule on small businesses and should therefore be revised.

NMFS estimates that the proposed rule will affect 2,524 small entities.²¹ These entities include a variety of individual vessels of varying types including commercial shipping, commercial fishing, industrial work, passenger (non-cruise), pilot, towing/pushing, and others.

NMFS estimates that the average costs to affected small entities relative to their annual revenue will range from 0.06 percent to 2.09 percent.²² For small commercial fishing vessels, NMFS estimated that the annual increase in cost would be \$403. However, it appears that NMFS has not estimated all costs of the rule for small entities. In its analysis, NMFS estimates additional operating costs small entities would bear due to delays in transit. While this estimate captures additional costs to complete a trip, it does not include the opportunity cost of the delay. In addition to the added operating costs to complete a trip, small businesses can no longer use the time they are delayed for additional trips that would have generated additional revenue.

NMFS should include the foregone trips and lost revenue in the cost estimates for the rule. Unlike the estimates for operating costs due to delays, opportunity costs may not be linear. For example, a delay may cause a fishing vessel to miss a departure to take advantage of a short window of good weather, losing revenue for an entire trip, not just for the number of hours delayed. A late arrival at a packing facility may mean a fishing vessel waits to pack until the next day and may miss a day of fishing. Delays for vessels offering excursions may mean that entities may not be able to offer as many trips in a day, or that some current offerings will no longer be practical.

²¹ 87 Fed. Reg 46921 at 46934.

²² *Id.*

Due to these potential discrepancies in NMFS' analysis, Advocacy urges NMFS to consider all potential impacts to small businesses from the proposed rule, and to update its IRFA to better account for these small business impacts.²³

B. NMFS should consider feasible alternatives to the proposed rule that would minimize the burden to the maritime community while still offering maximum conservation protections for the whales.

It is well known that small businesses are especially sensitive to complying with duplicative regulations. The affected small entities emphasized that they are committed to whale conservation. Given that there are already several regulations that impose restrictions on the maritime industry, and that the affected small entities emphasized that they are committed to whale conservation, NMFS should consider agency actions that protect and encourage population growth of the right whales without imposing additional restrictions on the maritime community. NMFS may consider exploring whether there are whale-centric actions that can be taken. For instance, NMFS could designate protective environments for female whales and calves so that there is less of a chance of man-made and natural harm. Additional considerations may include the use of technology such as safe tagging and monitoring devices. These actions may better protect right whales. Advocacy encourages NMFS to consider small entity comments in its review of whether additional alternatives are warranted.

1. NMFS should give the maritime community the opportunity to research and propose additional, or new technologies, that may assist in the detection and presence of whales.

Many small businesses indicated that they had not been consulted prior to the issuance of the proposed rule. They saw this as a missed opportunity for the maritime community to work with NMFS to potentially develop additional technologies to assist in whale detection. NMFS acknowledges in the proposed rule that future whale avoidance technologies may one day play a role in whale protection.²⁴ The maritime industry told Advocacy that it looks forward to helping develop such technologies. These technologies could include radar or sonar detection devices, safe tagging options for whales so that their movements and locations can be better tracked, and other innovations industry may contribute. Knowing specifically where whales are is mutually beneficial to mariners and whales, because boats would be able to avoid whales or slow their speeds.

²³ See Comments from the American Sportfishing Association, Boat Owners Association of the United States, Center for Sportfishing Policy, Coastal Conservation Association, Congressional Sportsmen's Foundation, Guy Harvey Ocean Foundation, International Game Fish Association, Marine Retailers Association of the Americas, National Marine Manufacturers Association, Recreational Fishing Alliance, and the Theodore Roosevelt Conservation Partnership, filed on October 3, 2022, available at: [Right-Whale-Rec-Fishing-and-Boating-Comment-Letter-10.3.22.pdf \(sportfishingpolicy.com\)](https://www.sportfishingpolicy.com/Right-Whale-Rec-Fishing-and-Boating-Comment-Letter-10.3.22.pdf).

²⁴ 87 Fed. Reg. 46921 at 46932.

2. NMFS should consider additional outreach and education to those vessels most likely to be less informed of the current restrictions.

Previously, NMFS issued two rulemakings aimed at the protection of right whales.²⁵ In this proposed rule NMFS acknowledges that, despite its education efforts, there are still mariners who do not comply with the existing vessel strike restrictions. Many small business owners stated that they already comply with existing regulations, and that they already take extra precautions in areas where right whales are known to be present, because of the hefty penalties that could be imposed upon them by the Marine Mammal Protection Act and the Endangered Species Act. Some of the small businesses that Advocacy consulted with stated that there may be a lack of education among private boat operators. One small boat manufacturer indicated that they would be willing to continue outreach and education efforts to those who buy recreational boats so that they are better informed of the restrictions. NMFS should consider additional outreach, education, and enforcement for private operators who may likely be less informed of the restrictions in place at the time of their trip and who may be contributing to low compliance with the existing rules.

IV. Conclusion

NMFS should review and revise its Initial Regulatory Flexibility Act analysis as it may have underestimated the impacts of the rule on small businesses. Advocacy also encourages NMFS to explore feasible alternatives to the rule that would better ensure right whale conservation without further restricting maritime activities along the eastern seaboard. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,

/s/

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/s/

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²⁵ 62 Fed. Reg. 6729 and 73 Fed. Reg. 60173.

Copy to: Sabeel A. Rahman, Associate Administrator
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