



441 G St. N.W.  
Washington, DC 20548

B-325383

December 20, 2013

The Honorable Jay Rockefeller  
Chairman  
The Honorable John Thune  
Ranking Member  
Committee on Commerce, Science, and Transportation  
United States Senate

The Honorable Doc Hastings  
Chairman  
The Honorable Peter A. DeFazio  
Ranking Member  
Committee on Natural Resources  
House of Representatives

Subject: *Department of Commerce, National Oceanic and Atmospheric Administration:  
Endangered Fish and Wildlife; Final Rule To Remove the Sunset Provision of the Final  
Rule Implementing Vessel Speed Restrictions To Reduce the Threat of Ship Collisions  
With North Atlantic Right Whales*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Services (NMFS) entitled “Endangered Fish and Wildlife; Final Rule To Remove the Sunset Provision of the Final Rule Implementing Vessel Speed Restrictions To Reduce the Threat of Ship Collisions With North Atlantic Right Whales” (RIN: 0648-BB20). We received the rule on December 9, 2013. It was published in the *Federal Register* as a final rule on December 9, 2013, with a stated effective date of December 6, 2013. 78 Fed. Reg. 73,726.

The final rule eliminates the expiration date or sunset clause contained in regulations restricting vessel speeds in order to reduce the likelihood of collisions with North Atlantic right whales causing death or serious injury. The regulations restrict vessel speeds to no more than 10 knots for vessels 65 feet (19.8 meters) or greater in overall length in certain locations and at certain times of the year along the east coast of the U.S. Atlantic seaboard. The speed regulations were set to expire December 9, 2013, unless the sunset clause is removed. With this final rule, NMFS is removing the rule’s sunset provision. All other aspects of the rule remain in place until circumstances warrant further changes to the rule.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). This final rule was both received and published on December 9, 2013. The rule has a stated effective date of December 6, 2013. Therefore, it does not have the required 60-day delay before the stated effective date as required by CRA.

However, notwithstanding the 60-day delay requirement, any rule that an agency for good cause finds that notice and comment are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. 5 U.S.C. §§ 553(d)(3), 808(2). Although NMFS did not discuss the 60-day delay requirement in the rule, the agency did find good cause to waive the 30-day delay under the Administrative Procedure Act.

Enclosed is our assessment of NMFS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Although NMFS indicated in its submission to us that it conducted a cost-benefit analysis, it was not clear that such analysis was included in its submission to us. Additionally, NMFS indicated that the requirement to prepare a written statement under section 202 of the Unfunded Mandates Act was not applicable. Our review of remaining procedural steps taken indicates that NMFS complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer  
Managing Associate General Counsel

Enclosure

cc: Samuel D. Rauch III  
Deputy Assistant Administrator  
for Regulatory Programs  
Department of Commerce

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF COMMERCE,  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
ENTITLED  
"ENDANGERED FISH AND WILDLIFE; FINAL RULE TO REMOVE  
THE SUNSET PROVISION OF THE FINAL RULE IMPLEMENTING  
VESSEL SPEED RESTRICTIONS TO REDUCE THE THREAT OF  
SHIP COLLISIONS WITH NORTH ATLANTIC RIGHT WHALES"  
(RIN: 0648-BB20)

(i) Cost-benefit analysis

In its submission to us the National Marine Fisheries Service (NMFS) indicated that it had prepared an analysis of the costs and benefits of this final rule. In the rule itself, NMFS discussed four commenters' concerns regarding the economic impacts of the rule. NMFS found that these comments either did not provide sufficient information or data or were not applicable to the rule. This final rule also referenced the economic analysis done related to the prior rule establishing the speed restrictions.<sup>1</sup> The rule also referenced a revised economic analysis available electronically;<sup>2</sup> however this revised economic analysis was not provided as part of the agency's report to us under the Congressional Review Act (CRA).<sup>3</sup>

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

NMFS prepared a Final Regulatory Flexibility Analysis of this final rule. The analysis included (1) a description and estimate of the number of small entities to which the final rule would apply; (2) a description of the projected reporting, recordkeeping, and other compliance requirements of the final rule; (3) issues raised by public comments regarding economic impacts; and (4) a description of the steps the agency took to minimize the impact on small entities. NMFS determined that seven industries are directly affected by this rulemaking: commercial shipping, high-speed passenger ferries, regular-speed passenger ferries, high-speed whale watching vessels, regular-speed whale watching vessels, commercial fishing vessels, and charter fishing vessels. The numbers of small entities NMFS expects to be affected by this rule by industry are: 362 commercial shipping (with various vessel classifications), 297 commercial fishing,

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<sup>1</sup> The cost of that previous final rule was \$137.3 million, which was comprised of \$87.6 million in direct economic impacts and \$49.7 million in indirect economic impacts. See 73 Fed. Reg. 60,173; GAO, *Department of Commerce, National Oceanic and Atmospheric Administration: Endangered Fish and Wildlife; Final Rule To Implement Speed Restrictions to Reduce the Threat of Ship Collisions With North Atlantic Right Whales*, GAO-09-117R (Washington, D.C.: Oct. 27, 2008).

<sup>2</sup> The website address listed in the rule (<http://www.nmfs.noaa.gov/shipstrike>) was not a valid address as of December 13, 2013. A similar address (<http://www.nmfs.noaa.gov/pr/shipstrike>) did contain information relevant to this final rule. However, no document entitled revised economic analysis was readily apparent at this address as of December 13, 2013.

<sup>3</sup> An agency is required to submit to GAO, among other things, "a complete copy of the cost-benefit analysis of the rule, if any" as part of its report on any rule it promulgates. 5 U.S.C. § 801(a)(1)(B)(i).

40 charter fishing, 14 passenger ferry, and 22 whale-watching. NMFS expects economic impacts to be 0.04 percent of the annual revenue of small entities operating in the commercial shipping industry, 0.04 percent in commercial fishing operations, and 4.30 percent in charter fishing operations. The agency expects no or minimal impacts to ferry and whale-watching businesses.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

NMFS did not address the Act in the final rule. In its submission to us, NMFS indicated that the requirement to prepare a written statement under section 202 of the Act was not applicable.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

On June 6, 2013, NMFS published a proposed rule. 78 Fed. Reg. 34,024. In response to the proposed rule, NMFS received a total of 145,879 comments. Of the comments received, 73,560 were in the form of a petition signed by members of an organization; 71,126 were from individual members of four organizations who co-signed a form letter; and 659 submissions contained individual comments from members of one of those organizations. These four organizations compiled and submitted the petition, the co-signed letter, and individual member comments. Of the remainder of the comments, 483 were from non-affiliated individuals; 21 came from ports and pilot association representatives; 11 from environmental organizations (other than the ones noted above); 7 from industry associations; 6 representing state or federal agencies or their affiliates; 3 from commercial whale-watch or ferry companies; 2 from public aquariums; and 1 from a commercial fishing association.

The agency found good cause to waive the 30-day delay in effectiveness under the Act for this final rule. The agency found that the public interest requires that the sunset provision be removed effective December 8, 2013, to keep in place the conservation measure to protect the endangered North Atlantic right whales.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

NMFS determined that this final rule contains an information collection requirement under the Act. Vessel captains are required to log deviations from the 10-knot speed limit when necessary for safe operations. NMFS estimated that public reporting burden for logbook entries in the event of deviation from speed restrictions will average 5 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Statutory authorization for the rule

NMFS promulgated this final rule under the authority of sections 1531 to 1543 and 1361 to 1423h of title 16, United States Code.

Executive Order No. 12,866 (Regulatory Planning and Review)

In the final rule NMFS stated: "The Office of Management and Budget has determined that this final rule is significant for purposes of Executive Order 12,866, but it does not qualify as

economically significant.” 78 Fed. Reg. 73,726, 73,735 (Dec. 9, 2013). However, according to Reginfo.gov,<sup>4</sup> this final rule is economically significant under the Order.<sup>5</sup>

Executive Order No. 13,132 (Federalism)

NMFS determined that this final rule does not have federalism implications under the Order.

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<sup>4</sup> Reginfo.gov is a website operated by the Office of Information and Regulatory Affairs (OIRA), which is part of the Office of Management and Budget.

<sup>5</sup> *OIRA Conclusion of EO 12866 Regulatory Review*, available at [www.reginfo.gov/public/do/eoDetails?rrid=123473](http://www.reginfo.gov/public/do/eoDetails?rrid=123473) (last visited Dec. 13, 2013).