



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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

B-334263

May 13, 2022

The Honorable Maria Cantwell
Chairwoman
The Honorable Roger F. Wicker
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Raúl M. Grijalva
Chairman
The Honorable Bruce Westerman
Ranking Member
Committee on Natural Resources
House of Representatives

Subject: *Department of Commerce, National Oceanic and Atmospheric Administration: Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery*

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) entitled “Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery” (RIN: 0648-BJ09). We received the rule on April 28, 2022. It was published in the *Federal Register* as a final rule on September 17, 2021. 86 Fed. Reg. 51970. The effective date is October 18, 2021.

According to NOAA, the final rule amends the regulations implementing the Atlantic Large Whale Take Reduction Plan to reduce the incidental mortality and serious injury to North Atlantic right whales, fin whales, and humpback whales in northeast commercial lobster and Jonah crab trap/pot fisheries to meet the goals of the Marine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1072 (Oct. 21, 1972), and the Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 844 (Dec. 28, 1973). NOAA stated the rule also makes a small revision to federal regulations implemented under the Atlantic Sun Marine Fisheries Commission’s Interstate Fishery Management Plan for American Lobster to increase the maximum length of a lobster trap trawl groundline. Finally, NOAA stated that this action is necessary to reduce the risks to North Atlantic right whales and other large whales associated with the presence of fishing gear in waters used by these animals.

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). Here, the final rule was published in the *Federal*

Register on September 17, 2021. 86 Fed. Reg. 51970. The rule was received by the Senate on February 16, 2022. 168 Cong. Rec. S1052 (daily ed. March 8, 2022). The rule was received by the House on February 22, 2022. 168 Cong. Rec. H3711 (March 11, 2022). It has an effective date of October 18, 2021. Therefore, based on the dates of receipt by the Senate and the House, the rule does not have the required 60-day delay.

Enclosed is our assessment of NOAA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. 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 Shari Brewster, Assistant General Counsel, at (202) 512-6398.



Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Jaclyn Taylor
Biologist
NMFS Office of Protected Resources
Department of Commerce

ENCLOSURE

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
"TAKING OF MARINE MAMMALS INCIDENTAL TO COMMERCIAL
FISHING OPERATIONS; ATLANTIC LARGE WHALE TAKE REDUCTION PLAN
REGULATIONS; ATLANTIC COASTAL FISHERIES COOPERATIVE
MANAGEMENT ACT PROVISIONS; AMERICAN LOBSTER FISHERY"
(RIN: 0648-BJ09)

(i) Cost-benefit analysis

In its submission to us, the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) indicated it prepared an analysis of the costs and benefits of this final rule. NOAA stated the intention of this rule is a 60 to 80 percent risk reduction for right whales to reduce incidental entanglement mortality and serious injury to below the potential biological removal level of 0.8 mortalities and serious injuries a year. NOAA estimates the first-year costs under the rule range from \$9.8 million to \$19.2 million, depending on implementation assumptions (e.g., buoy lines relocated versus buoy lines removed in seasonal restricted areas).

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

NOAA prepared a Final Regulatory Flexibility Analysis. The analysis included (1) a summary of the significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis, a summary of NOAA's assessment of such issues, and a statement of any changes made in the final rule as a result of such comments; (2) a description and estimate of the number of small entities to which the rules would apply; (3) a description of the steps NOAA has taken to minimize the significant economic impact on small entities consistent with the stated objective of applicable statutes; (4) a description of projected reporting, recordkeeping, and other compliance requirements; and (5) a discussion of the consistency with the Coastal Zone Management Act.

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

In its submission to us, NOAA indicated it did not prepare a written statement under the Act.

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

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

On December 31, 2020, NOAA published a proposed rule. 85 Fed. Reg. 86878. NOAA stated that in January 2021 it held four public information sessions and in February 2021 it held four public hearings. NOAA went on to state that it received a total of 122 oral comments at the public information sessions and hearings, and 171,213 written comments from

academic/scientific individuals or organizations, fishing industry associations, non-governmental organizations, members of the public, fishermen, state/federal fishery resource managers, state/federal legislators, representatives from other industries, towns, federal agencies, and manufacturers. NOAA further stated it considered all written and oral public submissions received during the public comment period. Finally, NOAA stated it did not provide responses to comments outside the scope of the rule, but identified 187 distinct substantive comments that were within the scope of the rule and provided specific comments and responses to each.

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

NOAA determined that this final rule contains information collection requirements under the Act. NOAA stated the rule changes the existing requirements for gear marking, Office of Management and Budget (OMB) Control Number 0648-0364, which has an estimated burden of \$4.5 to \$5.9 million.

Statutory authorization for the rule

NOAA promulgated this final rule pursuant to sections 1361 *et seq.* and 1531 *et seq.* of title 16, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

NOAA stated the final rule has been determined significant for the purposes of the Order.

Executive Order No. 13132 (Federalism)

In its submission to us, NOAA indicated it did not prepare a written statement under the Order.