

Commerce, certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. Because the harvest of northern fur seals on the Pribilof Islands, Alaska, is for subsistence purposes only, the estimate of subsistence need would not have an economic effect on any small entities. Therefore, a regulatory flexibility analysis was not prepared.

Paperwork Reduction Act

This action does not require the collection of information.

Executive Order 13132 – Federalism

This action does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 13132 because this action does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nonetheless, NMFS worked closely with local governments in the Pribilof Islands, and these estimates of subsistence needs were prepared by the local governments in St. Paul and St. George, with assistance from NMFS officials.

Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

E.O. 13175 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments, or the Federal government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. This action does not impose substantial direct compliance costs on the communities of Indian tribal governments. Nonetheless, NMFS took several steps to work with affected tribal governments to prepare and implement the action. These steps included discussions on subsistence needs and mechanisms to ensure that the harvest is conducted in a non-wasteful manner. NMFS signed cooperative agreements with St. Paul in 2000 and with St. George in 2001 pursuant to section 119 of the MMPA.

Dated: February 10, 2006.

William T. Hogarth,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 224 and 229

[Docket No. 060213033–6033–01; I.D. 021006A]

RIN 0648–AU23

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP) and Endangered Species Conservation; Restriction of Fishing Activities

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions on gillnet fishing in the Southeast U.S. Restricted Area through March 31, 2006, consistent with the requirements of the ALWTRP's implementing regulations. NMFS is taking this action based on its determination that a right whale mortality, documented on January 22, 2006, was the result of an entanglement by gillnet gear within the Southeast U.S. Restricted Area. This action is necessary to protect North Atlantic right whales from further serious injury or mortality from entanglement in gillnet gear in the Southeast U.S. Restricted Area.

DATES: This action is effective from 0001 hours February 15, 2006 through 2400 hours March 31, 2006.

ADDRESSES: Copies of the Environmental Assessment (EA) prepared in association with this temporary rule may be obtained from the persons listed below under **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Vicki Cornish, 727–824–5312, Juan Levesque, 727–824–5312, or Barb Zoodsma, 904–321–2806.

Electronic Access: Regulations and background documents for the ALWTRP can be downloaded from the ALWTRP Web site at <http://www.nero.noaa.gov/whaletrp/>.

SUPPLEMENTARY INFORMATION:

Background

The North Atlantic right whale (*Eubalaena glacialis*) was severely depleted by commercial whaling and despite protection from commercial harvest since 1935, has not recovered. The population is believed to be at or less than 300 individuals, making it one of the most critically endangered large whale species in the world (NMFS, 2005).

The North Atlantic right whale has been listed as endangered under the Endangered Species Act (ESA) since the ESA's passage in 1973 (35 FR 8495, June 2, 1970). In June 1994, NMFS declared three areas of the right whale's range in the United States as critical habitat: (1) Great South Channel, (2) Cape Cod Bay, and (3) the Southeastern U.S. (59 FR 28793, June 3, 1994). The Southeastern U.S. critical habitat includes coastal waters between 31°15' N lat. and 30°15' N lat. from the coast out 15 nautical miles, and the coastal waters between 30°15' N lat. and 28°00' N lat. from the coast out 5 nautical miles (50 CFR 226.203).

North Atlantic right whales occur in coastal and nearshore waters off the eastern United States and Canada, areas also used by fishing and other maritime activities that adversely affect the species. Deaths from collisions with ships and entanglement in fishing gear are significant impediments to the recovery of the species. From 1997 to 2001, human-caused mortality and serious injury to North Atlantic right whales from fishery entanglements and ship strikes was estimated as an average of 2.0 per year (Waring *et al.*, 2003). A serious injury has been defined as “any injury that will likely result in mortality” (50 CFR 216.3). Kraus *et al.* (2005) indicated that the overall mortality rate increased between 1980 and 1998 to a level of at least four percent per year, a rate that is not sustainable. The Potential Biological Removal (PBR) level for right whales is zero; thus, any mortality or serious injury to the species is considered significant.

The serious injury and mortality of the right whale as a result of commercial fishing activities continues to occur at a rate above PBR (Waring *et al.*, 2003). Knowlton and Kraus (2001) documented 56 right whale human-related serious injuries and deaths from 1970 to 1999, with at least 31 attributed to entanglements in fishing gear, for an average of 1.0 mortalities and serious injuries per year over that time period. Cole *et al.* (2005) documented, for 1999–2003, 31 reports of entanglements, 5 resulting in serious injuries and 3

resulting in mortalities, for an average of 1.6 mortalities and serious injuries per year over that time period.

NMFS criteria for determining whether an entanglement of a right whale is a serious injury (i.e., an injury likely to result in the mortality of an animal, when its actual fate is unknown), include fishing line constricting the tail flukes of the whale (Cole *et al.*, 2005). The same document states that a whale is typically not considered seriously injured if all constricting lines are shed by the animal or removed (presumably by an experienced team of disentanglement experts).

To reduce the incidental serious injury and mortality of marine mammal stocks in commercial fishing operations, section 118(f) of the Marine Mammal Protection Act (MMPA) directs NMFS to develop and implement Take Reduction Plans (TRP) to assist in the recovery or prevent the depletion of each strategic stock that interacts with a Category I or II fishery, as defined and classified in the annual List of Fisheries.

On August 6, 1996 (61 FR 40819), NMFS established the Atlantic Large Whale Take Reduction Team (ALWTRT) to prepare a draft TRP to reduce the incidental serious injury and mortality of right, humpback, and fin whales in commercial fishing operations, as well as to provide conservation benefits to a fourth, non-endangered species, the minke whale. The ALWTRT submitted a report to NMFS on February 1, 1997, with recommendations to reduce the serious injury and mortality of Atlantic large whales; however, the ALWTRT did not reach consensus on some recommendations. NMFS then developed a final TRP and implementing regulations after considerable public input. An interim final rule was published on July 22, 1997 (62 FR 39157), and a final rule was published February 16, 1999 (64 FR 7529), with an April 1, 1999, effective date. Since this time, the ALWTRP has been modified several times to reduce the serious injury and mortality of large whales in commercial fisheries.

The ALWTRP, implemented through regulations at 50 CFR 229.32, relies on a combination of fishing gear modifications, operational restrictions, and time/area closures to reduce the risk of large whales becoming entangled in commercial fishing gear. NMFS implemented specific management measures for commercial fishing operations in Southeast U.S. waters.

The Southeastern U.S. Restricted Area is defined in 50 CFR 229.32(f)(1)(i) as the waters from 32°00' N. lat. (near Savannah, GA) along the coast south to

27°51' N. lat. (near Sebastian Inlet, FL) and extending from the shore eastward out to 80°00' W. long. The regulations define the Southeast U.S. Observer Area as the Southeast U.S. Restricted Area plus an additional area along the coast south to 26°46.5' N. lat. (near West Palm Beach, FL) and extending from the shore eastward out to 80°00' W. long. (50 CFR 229.32(f)(1)(ii)).

In the Southeast U.S. Observer Area, the ALWTRP regulations mandate 100-percent observer coverage of the Southeastern U.S. Atlantic shark gillnet fishery during the restricted period (November 15 through March 31), which corresponds with the right whale calving season (50 CFR 229.32(f)(3)). Additionally, fishermen are prohibited from using shark gillnet gear, defined as 5-inches (0.127-m) or greater stretch mesh (50 CFR 229.2), in the Southeast U.S. Restricted Area during the restricted period (November 15 through March 31) (50 CFR 229.32(f)(4)(i)). Shark gillnetting using strikenet gear is allowed in the Southeast U.S. Restricted Area as long as the following conditions are met: (1) No nets are set at night or when visibility is less than 500 yards (460 m); (2) each set is made under the observation of a spotter plane; (3) no net is set within 3 nautical miles of a right, humpback, or fin whale; and (4) if a right, humpback, or fin whale moves within 3 nautical miles of the set gear, the gear is removed immediately from the water (50 CFR 229.32(f)(4)(iv)). Lastly, all gillnet fishermen are prohibited from fishing a straight set of gillnet gear at night within the Southeastern U.S. Restricted Area during the restricted period (November 15–March 31) (50 CFR 229.32(f)(4)(iii)).

Because of the right whale's extremely endangered status, NMFS included in the ALWTRP regulations contingency measures that would allow further restriction on fishing in the Cape Cod Bay critical habitat, Great South Channel restricted area, and the Southeast U.S. Restricted Area, if a right whale mortality or serious injury resulted from the use of certain fishing gear in those areas. Specifically, 50 CFR 229.32(g)(1) states that if a serious injury or mortality of a right whale occurs in the Southeast U.S. Restricted Area from November 15 through March 31 as a result of an entanglement by gillnet gear allowed to be used in that area and time, the AA shall close that area to that gear type for the rest of that time period and for that same time period in each subsequent year, unless the AA revises the restricted period or implements other measures.

Recent Events

On Sunday, January 22, 2006, at 10:30 a.m., a report was made to the United States Coast Guard by a member of the public that a floating whale had been spotted offshore of Jacksonville Beach, Florida. At approximately 11 a.m., a Florida Fish and Wildlife Commission (FWC) aerial survey team confirmed the whale species and location and photographed the carcass. The aerial survey team identified the whale as a right whale calf, and photos indicated the calf as having one large wound along the midline and smaller lesions around the base of its tail. The right whale calf was towed to shore that evening from the location of 30°14.4' N. lat., 81°04.2' W. long., which was approximately 1 nautical mile outside of designated right whale critical habitat, but within the Southeast U.S. Restricted Area.

Each year NMFS coordinates an extensive aerial survey effort in the Southeast U.S. right whale critical habitat area from December 1 through March 31. The New England Aquarium's right whale survey photograph database was consulted to determine the sighting history for the dead calf. On Friday, December 30, 2005, the calf and its mother were sighted together off St. Catherines Island, Georgia. The calf did not show evidence of entanglement at the time. On January 8 and 9, 2006, the pair were sighted off the mouth of Nassau Sound, Florida and Cumberland Sound, Georgia, respectively. By that time, the aerial survey photographs suggested the calf had linear scars, consistent with some type of entanglement event. The pair was last observed together off Jacksonville Beach, Florida, on Wednesday, January 11, 2006. On Saturday, January 21, 2006, the calf's mother was observed, without the calf, near the area where the dead calf was recovered the following day. The adult female right whale was observed breaching, blowing bubbles, diving and surface swimming, which may have been signs of agitated behavior. The calf's carcass was found and reported on January 22, 2006, approximately 16 nautical miles off Jacksonville Beach, Florida. Based on the condition of the whale when necropsied and local surface water temperatures, the investigators conclude that this animal died within 3 to 6 days prior to necropsy. An analysis of local wind and water currents prior to January 22 indicated that the winds were west to northwest, placing the location where the calf most likely died as inshore and north of where the carcass was found.

NMFS has determined that both the entanglement and death of the whale occurred within the Southeast U.S. Restricted Area for the following reasons: (1) All sightings of this calf occurred within the Southeast U.S. Restricted Area; (2) all the southeast sightings were recent; (3) mother-calf pairs typically remain on the calving grounds in January; (4) the carcass was found within the Southeast U.S. Restricted Area; and (5) the calf's most likely location when it died was inshore and north of where the carcass was found.

On Monday, January 23, 2006, at 7:15 a.m., a specialized large whale necropsy team, which consisted of various Federal and state government representatives, and university and non-profit marine mammal specialists, performed a thorough necropsy of the whale. This consisted of measuring, photographing, dissecting, and collecting tissues samples of the animal in order to determine the possible cause of death. The necropsy team's gross examination indicated a variety of lesions including numerous small lesions around the tailstock and a single large dorsal lesion. The whale had a complex array of wounds around its tailstock. Two wounds were bites from a small shark. Those wounds had been seen in aerial photos of the calf as early as December 30, 2005. Most of the remaining wounds formed straight-line, vee-, and diamond-shaped patterns. These small lesions appeared to be pre-mortem and caused by a fine cutting edge such as monofilament net, which would also correspond to the characteristic vee and diamond shapes of gillnet gear. There was also some post-mortem scavenging by sharks. The whale had a large wound splitting open most of its back. The wound appeared to have occurred post-mortem and was not the result of a vessel strike. The edges of the middle of the wound were clean-cut, while the ends were ragged. A notable observation by the necropsy team was that cyamids had migrated to the tailstock, indicating significant injury to this area which may have impeded the animal's ability to swim and dive. The necropsy team also noted that the blubber thickness would suggest the animal was in good body condition, but, based on its empty gastrointestinal track, it had not been able to nurse for at least a day prior to its death.

The immediate cause of death of the whale (e.g., drowning, dehydration, infection) has not been determined and may never be completely known. However, all available evidence suggests the entanglement and injury of the

whale by gillnet gear ultimately led to the death of the animal. The evidence of recent entanglement was clearly documented by the necropsy team. The degree of entanglement meets NMFS' criteria of a serious injury (i.e., an injury likely to result in mortality). While there was no entangling gear on the animal at the time it was reported, NMFS knows it was not removed through permitted disentanglement efforts, and NMFS believes that the calf did not disentangle itself as it was young and not expected to be strong enough to shed the imbedded gear. Therefore, based on the results of the necropsy, the New England Aquarium's aerial survey database, evidence of gillnet fisheries operating in the area (see Affected Fisheries), and in the absence of other significant explanatory findings, NMFS has determined that the right whale mortality, which occurred on January 22, 2006, was as a result of entanglement in gillnet gear.

Closure of Southeast U.S. Restricted Area to Gillnet Fisheries

NMFS has evaluated the recent right whale mortality event and determined that the criteria specified in 50 CFR 229.32(g)(1) for taking additional action to protect right whales from further serious injury or mortality, under the ALWTRP, have been met. NMFS has determined that the mortality of this right whale was due to entanglement in gillnet gear, and that the entanglement occurred within the Southeastern U.S. Restricted Area. Thus, NMFS believes that closing the Southeast U.S. Restricted Area to all gillnet gear through the remainder of the restricted period, through March 31, 2006, is warranted and urgent. Therefore, the AA announces that all fishing with gillnets is prohibited in the Southeast U.S. Restricted Area, beginning at 0001 hours February 15, 2006 through 2400 hours March 31, 2006. All such gillnets that are currently set must be retrieved by 11:59 p.m. on February 15, 2006. Since existing ALWTRP rules already prohibit gillnet fishing at night, except for run-around sets, which are tended sets, there is no need to provide any extended delay in effectiveness to allow fishermen to retrieve set gear.

This restriction will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA Web site, and other appropriate media immediately upon filing with the **Federal Register**.

The regulations at 50 CFR 229.32(g)(1) also requires the AA to close the Southeast U.S. Restricted Area for the rest of the time period, and for the time

period November 15 through March 31 in each subsequent year, unless the AA revises the restricted period or unless other measures are implemented. NMFS plans to seek assistance and recommendations from the ALWTRT at their next meeting in order to evaluate whether permanent closures within the Southeast U.S. Restricted Area are necessary.

Affected Gillnet Fisheries

In Southeast Atlantic waters, commercial fishermen target various finfish and shark species using gillnet gear of varied sizes and deployment techniques. Fisheries expected to be affected by this rulemaking include, but are not limited to, the Southeastern U.S. Atlantic shark gillnet fishery and the Southeast Atlantic gillnet fishery.

The Southeastern U.S. Atlantic shark gillnet fishery uses 5-inch (0.127 m) or greater stretch mesh gillnet gear, typically targeting various shark species. NMFS believes there are approximately six to eight active vessels in this fishery. The FWC's trip ticket database (2002–2005) for counties within the Southeast U.S. Restricted Area (Nassau, Duval, St. John's, Flagler, Volusia, and Brevard) indicates that overall shark landings, number of trips, and the dollar value of this fishery, has been declining since 2002 within this area. In 2005, there was a total of 280,235 pounds (127,113 kg) of sharks landed, which corresponded to 180 trips and a value of \$180,015. Although the Southeast U.S. Restricted Area consists of Florida and Georgia waters, landings information was only obtained from Florida since landings from gillnet gear are prohibited in the State of Georgia. This fishery is managed by the NMFS Office of Sustainable Fisheries, Highly Migratory Species Division.

The Southeast Atlantic gillnet fishery typically uses smaller mesh gillnet gear, less than 5-inch stretch mesh, targeting mostly coastal migratory species (King mackerel, Spanish mackerel, whiting, and bluefish). Based on the FWC's trip ticket database for 2005, NMFS believes that approximately 56 individuals participate in this fishery annually. Data from the same database for 2002–2005 for counties within the Southeast U.S. Restricted Area indicate that overall finfish landings (excluding whiting; see below), number of trips, and the value of the fishery has been decreasing since 2002 for fishermen targeting finfish with gillnets in this area. For 2005, there was a total of 153,905 pounds (69,810 kg) of finfish landed, which corresponded to 978 trips and a value of \$129,454. As stated above, the Southeast U.S. Restricted Area consists of Florida and

Georgia waters, but landings information was only obtained from Florida since landings from gillnet gear are prohibited in the State of Georgia. Florida gillnet finfish landings have been dominated by the following species: bluefish, Spanish mackerel, cobia, and King mackerel. These species are managed by NMFS and the South Atlantic Regional Fishery Management Council.

NMFS has also become aware of recent increases in fishing activity by fishermen specifically using sink gillnet gear of various mesh size targeting demersal finfish, primarily whiting (*Menticirrhus americanus*). In contrast to the above landings information, the FWC's trip ticket database (2002–2005) for counties within the Southeast U.S. Restricted Area indicates that overall finfish landings, number of trips, and the value of demersal finfish landings have been increasing since 2002, mostly from fishermen targeting whiting with gillnets in this area. NMFS is unaware how many participants fish for demersal finfish using only sink gillnet gear, since catches from all gillnet gear are combined in the trip ticket database. For 2005, there was a total of 461,858 pounds (209,495 kg) of whiting landed, which corresponded to 589 trips and a value of \$363,960. Again, the Southeast U.S. Restricted Area consists of Florida and Georgia waters; however, landings information was only obtained from Florida since landings from gillnet gear are prohibited in the State of Georgia. At this time, the South Atlantic Regional Fishery Management Council does not prohibit the use of gillnets within the southeast Exclusive Economic Zone waters for non-FMP species (50 CFR 600.725). Thus, fishermen who target whiting are not regulated by a FMP, because currently this species is not managed under the Coastal Migratory FMP or any other FMP.

The above-mentioned estimates for the total value of the gillnet fisheries operating in the Southeast U.S. Restricted Area are based on preliminary total annual landings for 2005. FWC's trip ticket data for counties within the Southeast U.S. Restricted Area for the past six years (2000–2005) during the months of February and March, indicate an average of 15 fishermen fish in these areas during the months that will be affected by this temporary closure. Total economic losses during February and March 2006 were projected, based on the combined average total landings and average total revenues from gillnet fishing in these three areas, and are estimated at 92,687 pounds and \$74,364.

Additional Conservation Measures

The AA may withdraw or modify any additional restriction on fishing activities if the AA determines that such action is warranted. Notification of any additional, modified, or suspended right whale conservation measures will be published in the **Federal Register** pursuant to 50 CFR 229.32(g)(1) or (2).

NMFS will continue to monitor right whale serious injuries and mortalities to gauge the effectiveness of these conservation measures. In addition, although the ALWTRT recommended additional measures to further protect right whales from serious injury and mortality in commercial fishing operations in southeast waters during 2005 and NMFS published a proposed rule on June 21, 2005 (70 FR 35894), NMFS believes that, at this time, because of the recent entanglement event and the current level of commercial gillnet fishing operations in Southeast waters, NMFS plans to seek assistance and recommendations from the ALWTRT at their next meeting in order to evaluate whether permanent closures within the Southeast U.S. Restricted Area are necessary in addition to the recently proposed measures.

Literature Cited

- Knowlton, A.R. and S.D. Kraus. 2001. Mortality and serious injury of North Atlantic right whales (*Eubalaena glacialis*) in the North Atlantic Ocean. J. Cetacean Res. Manage. (Special Issue) 2 (in press).
- Kraus, S.D., M.W. Brown, H. Caswell, C.W. Clark, M. Fujiwara, P.K. Hamilton, R.D. Kenney, A.R. Knowlton, S. Landry, C.A. Mayo, W.A. McLellan, M.J. Moore, D.P. Nowacek, D.A. Pabst, A.J. Read, R.M. Rolland. 2005. North Atlantic Right Whales in Crisis. Science 22 July 2005: Vol. 309. no. 5734, pp. 561–562.
- NMFS. 2005. Recovery Plan for the North Atlantic Right Whale (*Eubalaena glacialis*). National Marine Fisheries Service, Silver Spring, MD.
- Waring, G., R. Pace, J. Quintal, C. Fairfield and K. Maze-Foley. 2003. U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments—2003. NOAA Tech. Mem. NMFS–NE–182. 260 pp.

Classification

In accordance with section 118(f)(9) of the MMPA, the AA has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales. In addition, pursuant to section 11(f) of the ESA, the AA may promulgate regulations to enforce the ESA's prohibitions on the taking of endangered right whales.

An Environmental Assessment for this action was prepared and is available from the agency upon request.

Providing prior notice and opportunity for comment on this action would be impracticable because it would prevent NMFS from implementing timely measures, pursuant to regulations at 50 U.S.C. 229(g)(1), to immediately reduce the risk of further serious injury and mortality of endangered right whales. If this action were to be subject to the notice and comment rulemaking requirements of 5 U.S.C. 553, NMFS would not be able to assert these regulatory protections to endangered right whales because the rulemaking would not be concluded until some time beyond the end of the protection period. In order to ensure that right whales are protected during the restricted period, the AA finds that good cause exists, pursuant to 5 U.S.C. 553(b)(B), to waive prior notice and an opportunity to comment on this action to implement a commercial gillnet fishing closure within the Southeast U.S. Restricted Area to reduce the risk of entanglement of endangered right whales in commercial gillnet gear.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30-day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, right whales would be vulnerable to entanglement, which could result in further serious injury and mortality.

NMFS determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of Georgia and Florida. This determination was submitted on February 3, 2006, for review by the responsible state agencies under section 307 of the CZMA.

The rule implementing the commercial gillnet fishing closure within the Southeastern U.S. Restricted Area has been determined not to be significant under Executive Order (E.O.) 12866.

This temporary rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without prior notice and opportunity for public comment.

NMFS believes this temporary rule does not contain policies with federalism implications under E.O. 13132, since the state waters affected already prohibit gillnetting under state law; however, full consultation with the states was not practicable for this action pursuant to section 6 of E.O. 13132.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

Authority: 16 U.S.C. 1361 *et seq.*, 16 U.S.C. 1531 *et seq.*, and 50 CFR 229.32(g)(1).

Dated: February 13, 2006.

John Oliver,

*Deputy Assistant Administrator for
Operations, National Marine Fisheries
Service.*

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