distance that extended-haul trains may travel between inspections, and the meaning of certain language in the final rule. The fact that there are many issues that various organizations desire FRA to reconsider is not surprising, given the complexity of the final rule and the large number of issues it addresses. FRA will give each of these issues full consideration and issue a subsequent document explaining how it has addressed each issue and making any necessary amendments to the final rule. FRA hopes to issue such a comprehensive document concerning all issues raised in the petitions during the summer of 2001, but to the extent any particular issues require more time to resolve, the agency may address those separately at a later date.

Of the many issues raised in the petitions, only one issue concerns a provision for which the compliance date is scheduled to be May 31, 2001. This document concerns that issue. AAR's petition sought reconsideration of a provision requiring certain information about the testing of a two-way end-of-train (EOT) device to be provided to a locomotive engineer. The final rule requires that, if the person conducting the test of the two-way EOT is someone other than a member of the train crew, the locomotive engineer must be notified of the name of the person conducting the test and a record must be maintained, in the cab of the controlling locomotive, containing the name of that individual *See* 66 FR 4210, § 232.409(c). Under the provisions of the final rule, the compliance date for this and other requirements of Subpart E is May 31, 2001. *See* 66 FR 4193, § 232.1(b), and document on delay of effective date, 66 FR 9906 (February 12, 2001). To allow FRA an opportunity to respond to this issue without imposing a burden on the industry that might soon be withdrawn if the petition is granted, this document delays the compliance date of this specific requirement, from May 31, 2001, until further notice. If the petition is not granted with respect to that issue, the document explaining that decision will set a new compliance date for that provision. If the petition is granted, of course, there will be no need for any compliance date.

FRA emphasizes that this delay of compliance date applies only to the requirement to provide and retain the name of the person conducting the inspection of a two-way EOT device. The delay does not apply to the provisions for notification and retention of the other information regarding the inspection of a two-way EOT device required by the final rule. *See* 66 FR 4210, § 232.409(c). Nor does the delay apply to any other provision of the final rule, including other provisions addressed in AAR's petition and the petitions filed by other organizations. None of those other issues on which reconsideration is sought involves provisions having a compliance date in the near future. FRA anticipates resolving those petitions long before the compliance dates set forth in the final rule, which for most provisions is April 1, 2004.

List of Subjects in 49 CFR Part 232

Penalties, Railroad power brakes, Railroad safety, Two-way end-of-train devices.

The Rule

In consideration of the foregoing, 49 CFR part 232, as revised at 66 FR 4210 and delayed at 66 FR 9906, effective May 31, 2001, is amended as follows:

PART 232—[AMENDED]

1. The authority citation for part 232 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20301–20303, 20306, 21301–21302, 21304; 49 CFR 1.49(c), (m).

2. In § 232.409(c), add before the period at the end of the last sentence the following: ''**,** except that compliance with the following provision of this paragraph will not be required until further notice published in the **Federal Register:** the provision that the locomotive engineer shall be provided with the name of the person conducting the test and that a written or electronic record of the notification of the name of the person conducting the test shall be maintained in the cab of the controlling locomotive''.

Issued in Washington, D.C., on May 25, 2001.

George A. Gavalla,

Acting Deputy Administrator, Federal Railroad Administration.

[FR Doc. 01–13658 Filed 5–30–01; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 000225052–1102–02; I.D. 102599C]

RIN 0648–AN29

Regulations Governing the Approach to Humpback Whales in Alaska

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to establish measures to protect humpback whales, *Megaptera novaeangliae*, in waters within 200 nautical miles (370.4 km) of Alaska. Under these regulations it is unlawful for a person subject to the jurisdiction of the United States to approach, by any means, with some exceptions, within 100 yards (91.4 m) of a humpback whale.

DATES: Effective July 2, 2001.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analyses (EA/RIR/FRFA), prepared for this action are available from NMFS, Protected Resources Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, or by calling the Alaska Region, NMFS, at 907–586–7235.

FOR FURTHER INFORMATION CONTACT: Kaja Brix, 907–586–7235, Kaja.Brix@noaa.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under the authority of both the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) and the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*).

Background

The National Marine Fisheries Service published a proposed rule (65 FR 39336, June 26, 2000) that would have prohibited the approach by any person, by any means, with certain exceptions, within 200 yards (yds) (182.8 meters (m)) of a humpback whale, Megaptera novaeangliae, in waters within 200 nautical miles (370.4 km) of the coast of Alaska. The proposed rule prohibited approaches by any means, including by interception (e.g., placing the vessel in the path of the humpback whale so that the whale surfaces within the buffer zone), and prohibited the disruption of normal behavior or prior activity of a

whale. Changes from the proposed rule and reasons for those changes are discussed below.

The preamble to the proposed rule discussed species distribution and abundance, whale watching activity in Alaska and the impact of vessel traffic on whales. Please refer to the preamble to the proposed rule (65 FR 39336) and the accompanying Environmental Assessment (EA) for further background on the implementation of protective measures around humpback whales off Alaska.

The primary objective of limiting approaches around humpback whales is to minimize disturbance that could adversely affect the individual animal and to manage the threat to these animals caused by whale watching activities.

The potential for harm to humpback whales from vessel traffic has increased in recent years as the human environment in coastal Alaska has changed. Whale watching has increased in popularity and substantially more vessels are operating from several coastal communities in southeast Alaska and in southcentral Alaska (see EA). In addition, humpback whales are generally distributed throughout coastal waters during the summer months. Intensive feeding activity often keeps these whales in the same or general locations for extended periods of time. These localized aggregations of feeding humpback whales are easily accessible from a number of coastal communities.

This combination of factors may make humpback whales off Alaska particularly vulnerable to pressure from increasing vessel-based human activities. As a result, NMFS has determined that precautionary measures must be taken to protect the humpback whale.

The humpback whale is listed as endangered under ESA. Implementation of protective regulations is consistent with and under the authority of both the ESA and the MMPA. Section 11(f) of the ESA provides NMFS with broad rulemaking authority to enforce the provisions of the ESA. In addition, section 112(a) of the MMPA provides NMFS with broad authority to prescribe regulations that are necessary to carry out the purposes of the statute (see proposed rule for further details).

Changes From the Proposed Rule

NMFS proposed to prohibit approaches within 200 yds (182.8 m) of a humpback whale, by any means, including by interception, within 200 miles of the coast of Alaska. NMFS also proposed to prohibit the disruption of normal behavior or prior activity of a whale. In response to comments received during the public comment period NMFS is making the following changes in the final rule for this action:

NMFS is (1) prohibiting approaches within 100 yds (91.4 m) instead of the 200 yd (182.8 m) distance as outlined in the proposed rule; (2) implementing a ''slow, safe speed'' requirement within proximity of a humpback whale; and (3)creating exemptions for vessels limited in their ability to maneuver; commercial fishing vessels lawfully engaged in actively setting, retrieving or closely tending commercial fishing gear; and state, local or Federal government vessels operating in the course of official duty. Details of these changes are discussed below.

In this final rule NMFS prohibits anyone, with exceptions, from approaching by any means, including by interception, within 100 yds (91.4 m) of any humpback whale within 200 nautical miles of Alaska, or within inland waters of the state. ''Inland waters'' refers to the navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States (33 U.S.C. 2003(o)).

NMFS proposed a 200-yd (182.8-m) minimum approach distance in the proposed rule. NMFS received a number of comments (11 of 42) that specifically opposed the 200-yd (182.8-m) approach distance. Commenters stated that the distance was a significant departure from the 100-yd distance established in the Marine Mammal Viewing Guidelines (Guidelines). Commenters also noted that the 200-yd (182.8-m) distance was inconsistent with the 100-yd (91.4-m) distance established for approaches to humpback whales in Hawaii.

NMFS has decided to implement a 100-yd (91.4-m) distance to maintain consistency with the published Guidelines and with the regulations that exist for viewing humpback whales in Hawaii. Also, compliance will be essential to effective implementation of these regulations. Currently the industry is operating under the 100-yd (91.4-m) guideline. This distance is generally recognized as the minimum approach distance for waters around Alaska. Consistency with this guideline should contribute substantially towards achieving industry compliance.

NMFS is also implementing in the final rule a ''slow, safe speed'' requirement when a vessel is near a humpback whale. A large number of commenters (17 of 42) responding to the proposed rule requested that NMFS implement speed restrictions. The request for implementation of a speed limit was the prevailing comment received during the public comment period. Laist et al. (2001), in a study of worldwide occurrences of whales struck by ships, indicated that most lethal or severe injuries to whales struck by vessels occurs by ships traveling 14 knots (kts) or faster. The authors recommend that in areas where special caution is needed to avoid such events, measures to reduce the vessel speed below 14 kts may be beneficial.

While Laist et al. (2001) indicate that most lethal or severe injuries are caused by ships 80 meters long or longer, the potential also exists for smaller vessels traveling at fast speeds to injure a whale. This could be particularly the case for some of the coastal areas in waters off Alaska where whale density is high, whale surfacings unpredictable, and vessel traffic great.

NMFS believes that some form of speed restrictions should be imposed to reduce the likelihood of mortality or injury to a whale in the event of a vessel/whale collision. Implementation of a specific speed limit (e.g., less than 14 kts) throughout the state or even in local, specifically designated areas was, however, considered problematic from an enforcement and practical perspective. Practical impediments to using specific speed limits include the fact that ''clutch-in speed'' of vessels varies. For some vessels, the ''clutch-in speed'' may be greater than 10 kts. Practically as well as for enforceability, a safe speed standard, rather than a strict nautical mile-per-hour standard is appropriate.

NMFS is, therefore, implementing a requirement for ''slow, safe speed'' when a vessel is near humpback whales. In this situation, the U.S. Coast Guard recommends that operational guidance for vessels use language that mariners are familiar with, understand and accept by convention. This means application of ''safe speed'' as defined in the Inland Navigational Rules and the International Regulations for Preventing Collisions at Sea 1972 (COLREGS)(33 U.S.C. 2006 and 33 U.S.C. 1602, respectively). Implicit here is the recognition that mariners must adjust speeds to accommodate hazards that they may encounter during the course of operations. NMFS is extending this application to vessels operating around humpback whales.

Operation at a ''slow, safe speed'' will allow vessels sufficient time to vary course and speed to reduce the potential for a strike. The COLREGS Rule 6 defines operation such that ''every vessel shall at all times proceed at a safe speed so that she can take proper and

effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.'' A slow safe speed around whales will provide enhanced safety to the whale, the vessel and the passengers onboard the vessel.

NMFS notes that particular ''hot spots'' of concern in coastal Alaska contain higher concentrations of whales and vessel traffic. These areas are generally focal areas for whale watching activity as well as major thoroughfares for large ship traffic.

While NMFS is implementing the requirement for a slow, safe speed for all waters off Alaska when near a humpback whale, NMFS encourages vessel operators to pay particular attention to maintaining a slow, safe speed in areas of high whale density. Some of these areas include parts of Southeast Alaska such as Frederick Sound; Chatham Strait; North Pass, which is between the north end of Shelter Island and the south end of Lincoln Island near Juneau; Point Adolphus, near Gustavus; and the Sitka Sound area. Reduced speeds in these areas will likely minimize the potential for collisions and reduce the likelihood of serious injuries or mortalities should an inadvertent collision occur.

Three additional modifications in the final rule from the proposed rule were made: (1) an exemption for commercial fishing vessels while commercial fishing, (2) an exemption for vessels limited in their ability to maneuver, and (3) an exemption for state, local and Federal government vessels operating in the course of official duty. These exemptions have been included in response to public comment and due consideration by NMFS.

NMFS is exempting commercial fishing vessels lawfully engaged in actively setting, retrieving or closely tending commercial fishing gear. For purposes of this regulation commercial fishing means taking or harvesting fish or fishery resources to sell, barter or trade. Commercial fishing does not include commercial passenger fishing operations (i.e., charter operations or sport fishing activities).

Commercial fishing vessels are not actively seeking whales. Commercial fishermen usually avoid setting gear close to whales to prevent injury to the whale and damage to the fishing gear. In some instances commercial fishing vessels may find themselves, while actively fishing, in close proximity to a humpback whale. Fishing operational requirements may preclude these vessels from adhering to the approach prohibition without compromising their gear or catch. Therefore, NMFS is exempting these vessels while they are fishing.

NMFS is specifically not exempting commercial fishing vessels in transit. Commercial fishing vessels in transit should be able to abide by the approach restrictions in the same way as other transiting vessels or those purposefully approaching humpback whales. Abiding by these regulations should not cause commercial fishermen in transit significant alterations in their path or the time taken to get to a fishing ground to set or to retrieve gear.

NMFS is exempting vessels limited in their ability to maneuver. Certain vessel types and some vessels in certain situations may find it necessary to closely approach a humpback whale to maintain safe operating conditions. Limitations in maneuverability could pose hazards to the vessel should it be required to adhere to the whale approach regulations. The primary motivation for this exemption is vessel and personal safety. Some examples of vessels that may be restricted in their ability to maneuver and who may be able to claim this exemption are tugs pulling large barges, vessels with deep draft that may encounter problems maneuvering in narrow and/or shallow passageways, vessels laying cable or other similar vessel types or situations.

Finally, NMFS is also exempting state, local and Federal government vessels operating in the course of official duty. The activities of these vessels are often critical to important safety missions or other activities that require that they closely approach a humpback whale. Examples of this type of operation may be Coast Guard vessels engaged in a search and rescue operation, military ships undertaking activities critical to national security, local or state government enforcement or safety operations, research vessels, or vessels engaged in disentangling a humpback whale or other marine mammals. These examples are not meant to be exhaustive. There may be other situations in which vessels limited in their ability to maneuver or state, local or Federal government vessels would be exempt from approaches within 100 yds (91.4 m) of a humpback whale. A requirement of any of the above-mentioned exemptions is that any person who claims the applicability of an exception to the approach regulations has the burden of proving that the exemption applies.

Section 10(e) of the ESA provides an exemption to the Section 9 ''take'' prohibition for Alaska Natives harvesting threatened or endangered species for subsistence purposes. While humpback whales are not currently harvested off Alaska, nothing in this regulation is intended to affect the rights of Alaska Natives under the exemption provided in Section 10(e).

Comments and Responses

NMFS received 42 letters of comment in response to a request for comments in the proposed rule. Many letters contained similar comments and are consolidated. Response to comments addressing significant issues and requiring a reply are summarized below.

Comment 1: Eleven (of 42) commenters supported making the 100-yd (91.4-m) approach distance in the current Alaska Marine Mammal Viewing Guidelines the regulatory approach distance.

Response: NMFS concurs. Please see preamble to the final rule for further explanation on this change from the proposed rule.

Comment 2: Twelve commenters supported the 200-yd (182.8-m) proposed approach distance.

Response: While some comments supported the proposed 200-yd (182.8-m) approach limit, NMFS believes that maintaining consistency with regulations governing approaches to humpback whales in Hawaii, as well as with the Guidelines already established for waters off Alaska is important.

Comment 3: Seventeen commenters supported the inclusion of speed limits in regulations. Some suggested a speed limit range of 10-14 knots.

Response: NMFS concurs that some measure of restricting speed is necessary. Laist et al. (2001) showed a critical threshold speed of 14 kts below which serious injury and mortality of whales struck by vessels was minimized. The implementation of a specific speed limit is problematic from a practical and enforcement standpoint. However, to minimize the chance of whale/vessel collisions and the potential for serious injury or mortality NMFS is requiring that vessels maintain a slow, safe speed in proximity to a humpback whale. See the preamble to the final rule for further details.

Comment 4: NMFS did not do enough public outreach on the regulations. In general more public outreach is needed. Commercial operators should be included in the process of creating regulations.

Response: NMFS conducted extensive public outreach upon publication of the Marine Mammal Viewing Guidelines (Guidelines) in 1996. NMFS distributed the Guidelines brochures widely throughout Alaska, both in their original versions and later as they were revised. Public meetings were also held in key coastal communities around the state to

increase public awareness of and compliance with the Guidelines. NMFS has met regularly with interested industry groups to discuss marine mammal viewing and the Guidelines. In addition, prior to the development of the proposed rule NMFS solicited input statewide. NMFS contacted the public, industry, environmental groups and other interested parties, through a direct mailout letter as well as through paid advertisements in coastal newspapers throughout the state.

Comment 5: A combination of measures would be more effective than merely having an approach distance; i.e., combine approach distances with speed and time limits around animals and limits on number of vessels permitted within a certain radius of a humpback whale.

Response: In the final rule NMFS combined a minimum approach distance with a general speed restriction. A combination approach has advantages in that it is more comprehensive. However, enforcement of detailed combinations is difficult. As a result, NMFS has chosen to implement some of these measures as regulations and retain the other measures as guidelines. The Marine Mammal Viewing Guidelines, which contain some of the other measures mentioned in the comment, will remain in place as additional guidance for vessel behavior around humpback whales as well as around other marine mammal species. The Guidelines present a comprehensive approach to appropriate marine mammal viewing by combining measures such as minimum approach distances, time spent with an animal and general suggestions for vessel-, air- and land-based operations.

Comment 6: NMFS must dedicate sufficient resources to enforcement to make the regulations work.

Response: The Alaska Enforcement Division (AED) of the NMFS is dedicated to protecting all of the living marine resources in Alaska. Enforcement of the regulations promulgated under the MMPA and the ESA has been, and will continue to remain a priority, which is balanced with other priorities, for the AED. The AED recently purchased six patrol vessels that are capable of safely operating in any waters in Alaska where humpback whale watching is likely to occur. These resources provide increased capability for Special Agents and Enforcement Officers to prevent violations from occurring by providing transportation to coastal communities to educate the general public, to respond to reports of violations, and to enforce regulations.

Comment 7: NMFS should develop a permit or certification system. This could either be a government permit system or an industry-developed certification program. NMFS should consider granting some privileges to those with certification or a permit.

Response: Several private industry groups within the state have discussed and/or attempted to implement an industry-based certification program for whale watching activities within the state. This kind of effort is likely to improve voluntary compliance.

A government permit system may be more problematic. It would require a certain infrastructure that NMFS is not able to support at this time. A limited entry permit system may be warranted at some point; however, further analysis and discussions would be needed prior to consideration of a limited entry permit system. As mentioned in the EA, this type of system presents significant issues of equity in deciding the criteria for admission.

A permit system that simply provides a means to register vessels engaged in whale watching activity would, however, provide a better means to understand the nature of the industry.

Should a permit or certification program be considered in the future, NMFS would consider all aspects of implementation, including whether or not the granting of privileges to permittees should occur.

Comment 8: NMFS should exempt certain vessel classes or vessel types such as fishing vessels, those in the course of official duty (e.g., for the U.S. government), those limited in their ability to maneuver, or sport trollers. Other commenters suggested that no vessels should be exempt, particularly kayaks.

Response: NMFS agrees with the suggestion to exempt certain vessel types and vessels under certain circumstances. NMFS has incorporated into the final rule an exemption for commercial fishing vessels lawfully and actively engaged in setting, retrieving or closely tending their gear; vessels limited in their ability to maneuver; and state, local and federal government vessels during the course of official duty. Please see the section above on Changes from the Proposed Rule for further details on these exemptions.

NMFS agrees that vessels such as kayaks should not be exempt from the 100-yd (91.4-m) prohibition or be subject to some lesser distance. While kayaks, because they are small and virtually silent, could possibly approach whales closer than 100 yds (91.4 m) without causing a disturbance, empirical data does not exist to support such a conclusion. NMFS believes that a conservative approach of requiring all whale watch vessels (including kayaks) to adhere to the 100-yd (91.4-m) approach restriction provides the appropriate degree of protection. Further, allowing different classes of vessels to approach at different distances would make enforcement extremely difficult.

NMFS has not exempted other sport fishers such as trollers. Recreational fishers often also watch whales and could therefore cause undue disturbance to these animals. Sport fishers should be in a position to abide by the approach prohibition.

Comment 9: Many commenters noted that they have seen a rapid increase in the charter fleet numbers in recent years.

Response: NMFS agrees. Comprehensive data on the number of vessels engaged in whale watching or conducting wildlife charters are, however, difficult to obtain. The best available information indicates that the charter boat industry has increased substantially in the last 10 years.

Comment 10: Commenters suggested that a distance regulation might not be the most effective measure to protect whales. This regulation would also place a burden on those who know the whales the best, i.e. the whale watching industry.

Response: The intent of any whale watch regulation is to provide protection to the animals being viewed. A distance regulation can be an effective, practical and enforceable tool to manage vessel activity in the presence of whales. A distance regulation creates a buffer zone around the whale. This buffer zone should provide protection from disturbance caused by close approaches. It is also easily understandable for the public and easily enforceable.

While those involved in the whale watch industry may have significant experience with whale behavior this does not obviate the fact that vessel presence and proximity may affect the behavior of the whale. Thus, because the objective of whale watch vessels is to get relatively close to a whale the regulations on approaches would minimize the potential for harm by limiting this encroachment.

Comment 11: NMFS should include avoidance measures for those instances when the vessel operator finds him/herself closer than the minimum approach distance to the whale.

Response: Instances may occur in which a vessel finds itself within the minimum approach distance of a whale. This is most likely to occur when a

whale approaches a vessel. NMFS considered the implementation of avoidance measures for these circumstances in the development of the proposed regulations. NMFS concluded that requiring vessels to engage in avoidance measures could cause more disturbance than if vessels remained in their original position.

In tightly constrained areas of coastal Alaska, with potentially many vessels observing a whale at the same time, the requirement for avoidance measures may cause vessels to constantly be in motion as whales shift locations. As a result, avoidance measures have the potential to cause greater disturbance to the animals being viewed and could be dangerous to both the whales and the vessel.

Comment 12: More strict regulations will have a negative economic impact on charter operators. Customers will be disappointed by not being able to get closer to the whales and this will result in damage to business.

Response: NMFS has chosen to implement the status quo minimum approach distance specified in the Guidelines. Thus, the final regulation for approaches will not be more strict than the current recommendation. Because we are not differing from the status quo, the promulgation of regulations should not significantly alter customer satisfaction or participation in whale watch activities.

Comment 13: NMFS should extend the regulations to cover all whales. Untrained observers cannot be expected to distinguish among species.

Response: The different species of baleen whales could potentially be confused by inexperienced observers. However, the distribution of baleen species in Alaska and the patterns of whale watch traffic are such that most whale watch activity is conducted largely on humpback whales as the primary baleen species. Whale watch vessels in specific locations may encounter gray or fin whales. However, in locations where these other two species occur the vessel operators and naturalists are generally well-versed in species identification. NMFS chose to focus these regulations on interactions with humpback whales because of the local distribution patterns of this species and the concern over the greater pressure placed on this species by whale watch vessels.

Comment 14: NMFS should require that dedicated lookouts be posted on vessels.

Response: Dedicated whale watching vessels are the focus of this regulation to minimize impacts to humpback whales. These vessels typically have dedicated naturalists onboard searching for whales for their clients. Other than recreational vessels, for which it would not be practical to require dedicated lookouts, most vessels transiting coastal Alaska waters will have pilot house personnel who are actively scanning the water for hazards to navigation, including large cetaceans.

Comment 15: NMFS is targeting one group (charter operators) whose overall numbers are few compared to all boats on the water.

Response: While the number of whale watch charter vessels may be few compared to the overall number of vessels operating in coastal Alaska, charter boats, by the nature of their operation, have the greatest interaction with, and, therefore, the greatest potential to cause harm to, humpback whales. The intent of the regulation is to manage vessels interacting around humpback whales so that disturbance and harm to this species is minimized.

Comment 16: NMFS did not adequately justify the approach distance of 200 yds (182.8 m) over 100 yds (91.4 m) in the proposed rule.

Response: The proposed rule and the accompanying EA give details supporting the proposed implementation of a 200-yd (182.8-m) versus a 100-yd (91.4-m) minimum approach distance. In this final rule NMFS is implementing a 100-yd (91.4-m) minimum approach distance; therefore further explanation for a 200-yd (182.8-m) minimum approach distance is moot.

Comment 17: Where are cases of non-compliance documented?

Response: The Office of Enforcement records all complaints received by that office concerning non-compliance with the Guidelines or the MMPA and ESA. The Protected Resources Division in the Alaska Region also keeps on file any report of non-compliance received by that office.

Comment 18: One commenter noted observations of blatant violations of the Marine Mammal Viewing Guidelines and supports implementation of regulations.

Response: NMFS acknowledges that non-compliance with the Guidelines occurs. The regulations implemented here are designed to protect the whales and to provide an enforcement tool to respond to situations of non-compliance.

Comment 19: Current laws and guidelines are working well in places that one commenter visits.

Response: NMFS acknowledges that in some situations the Guidelines may be adequate to manage interactions with humpback whales. While compliance with the Guidelines may occur in some localized areas, universal compliance does not occur. The preamble to the proposed rule and the accompanying EA provide greater detail with respect to the inadequacy of the Guidelines.

Comment 20: One commenter suggested that a prohibition on interception of whales (leapfrogging) may make people pursue whales.

Response: NMFS reminds readers that pursuit is prohibited under the ESA.

Comment 21: The proposed rule did not provide an explanation of the link between a change in a whale's behavior as caused by a vessel and the biological significance of such a change.

Response: NMFS interprets biological significance to mean a change in vital rate parameters. The potential for vessel traffic to affect whales can occur on two levels: 1) short-term behavioral changes that disturb the animal or 2) long-term effects that result in changes to vital rates (e.g., reproductive or survival rate). The latter type of studies necessarily entails long-term observations and are difficult to conduct. Very few studies, if any, have examined the question of the long-term effects to whales by vessel approaches.

In addition, short-term studies indicate that changes occur in humpback whale behavior in response to vessel approaches. The ESA and the MMPA prohibit the ''take'' of a marine mammal. ''Take'' is defined in part to include any act of pursuit, torment or annoyance which has the potential to disturb a marine mammal in the wild by causing disruption of behavioral patterns. NMFS believes the results of the short-term studies indicate that conservation measures should be taken before any potential long-term effects occur.

Consistent with the definition of ''take'' and the associated prohibition on ''take,'' NMFS is implementing these regulations to prevent disturbance of humpback whales that may be caused by disruption of behavioral patterns. In addition, the precautionary principle would dictate that NMFS take action to protect a species based on the information that we have that shows that vessel traffic can cause changes in a whale's behavior.

Comment 22: Further research is needed before implementing regulations.

Response: NMFS acknowledges that more research would be beneficial. However, the absence of a greater body of knowledge does not preclude the adoption of protective measures. The ESA generally requires NMFS to use the best available information in managing protected species. NMFS believes

sufficient information is available to support this action. NMFS may revise protection efforts accordingly if future research demonstrates that additional or different means of protection are needed.

Comment 23: One commenter supported the application of the precautionary principle in protecting whales.

Response: NMFS agrees. In addition to the data available on the effects of vessel traffic on whales, NMFS believes that the application of the precautionary principle in this situation is warranted.

Comment 24: Several commenters suggested that NMFS turn the current Marine Mammal Viewing Guidelines into regulations.

Response: This final rule implements the 100-yd (91.4-m) minimum approach distance as recommended in the Guidelines. The Guidelines contain other measures to protect humpback whales, as well as other marine mammals, and these measures will remain as guidelines to supplement the regulations.

Comment 25: Few good statistics exist on the number of charter vessels operating in Alaska. Related to this, one commenter noted that NMFS provided totals of vessels registered in the state but did not break out those vessels operating on inland lakes and rivers.

Response: NMFS agrees that limited information is available on charter vessels operating in Alaska. Charter vessels must obtain a business license and a Coast Guard passenger license but they are not required to indicate anywhere that they do, or do not, engage in whale watching activity. As a result, a comprehensive picture of those vessels operating as whale watch charters in the state is not available. Specific operating patterns and locations of operation are also not available. In addition, in some locations trailered vessels may be used on the ocean, in rivers and on lakes and not exclusively in one water body.

Comment 26: The table on vessel collisions in the proposed rule did not identify the types of vessels that struck humpback whales; therefore it is hard to determine what kind of vessel is causing the problem.

Response: The summary statistics of vessel strikes in Alaska originated from the Alaska Region stranding database. The numbers presented in Table 1 of the EA are minimum estimates as not all collisions are reported. These reports are also opportunistic and often provide minimal specific information. The potential exists for all vessel types to collide with a whale. NMFS wants to ensure that no vessel collisions with whales occur. The measures implemented by this regulation should minimize the potential for any vessel to collide with a whale.

Comment 27: NMFS should keep the regulations as simple as possible.

Response: NMFS acknowledges the merit of making the regulations as simple as possible, provided that they are effective in protecting the whales. Simplicity enhances enforcement as well as compliance.

Comment 28: Does NMFS have general guidelines that it recommends for viewing whales?

Response: The Alaska Region has general Marine Mammal Viewing Guidelines published on our Regional website at www.fakr.noaa.gov. These Guidelines are also available in brochure format from the Alaska Region (see **ADDRESSES**).

Comment 29: The prohibition on interception in the proposed rule would preclude any vessels from being in front of a whale which would affect educational opportunities.

Response: The prohibition on interception does not preclude vessels from being in front of a whale. The interception prohibition, does, however, preclude vessels from repositioning themselves to intercept the path of a whale as the whale moves. While educational opportunities are an important component of whale watching, the regulations are designed foremost to address the protection of the humpback whale. The specific position of the vessel in relation to the orientation of the whale should not have an impact on educational opportunities.

Comment 30: Whales react to sound, not proximity of a vessel, and NMFS should limit sound production.

Response: Whales may react to sound as well as to the physical proximity of a vessel. Management of vessel approaches to humpback whales should result in the reduction of sound in the proximate environment. The actual management of sound itself would be difficult to accomplish on a practical level. Managing sound production would ultimately require a better understanding of the effect of sound on the whale and would also entail performance standards or specifications for engine construction and sound output. This type of measure would place significant burden on current and future vessel construction. NMFS provides further details on the issue of sound management in the accompanying EA.

Comment 31: In the proposed rule documents NMFS does not provide support to their contention that ''critical feeding activity may be interrupted by close approaches.''

Response: NMFS emphasizes the use of the word ''may'' in the statement as quoted here. It logically follows that given the demonstration that vessel activity causes changes in whales' behavior (see EA for details), that a whale engaged in feeding behavior may be affected by vessel activity.

Comment 32: In citations provided in the proposed rule NMFS notes that an effect of vessel presence was seen at 400 m distance from a whale but does not mention an effect at 200 m.

Response: The study by Baker and Herman (1989), to which this comment refers, showed an effect on whale behavior from vessels as close as 400 m and as far away as 4000 m. The authors did not indicate that the 200-m distance was tested in their study. However, if a whale reacts to a vessel that is 400 m away, presumably it is also likely to react to a vessel that is closer than that distance. A distance of 400 m was not proposed in the rule because it would have appreciably diminished the viewing experience. NMFS seeks to find a balance between protecting the humpback whale and allowing opportunities for whale watching to occur.

Comment 33: One commenter asserted that 200 yds (182.8 m) seems excessive.

Response: NMFS outlined its justification for the 200 yd (182.8 m) proposal in the proposed rule and accompanying EA. At this time NMFS declines to expand on this justification because the final rule will implement a 100-yd (91.4-m) approach distance.

Comment 34: NMFS should elaborate on why the 200-yd (182.8-m) rule would provide the greatest benefit to the environment, the whales, and their prey.

Response: See response to Comment 33.

Comment 35: One commenter requested that NMFS elaborate on the statement provided in the proposed rule documents that ''the perception by many people is that whale watching vessels approach too closely to marine mammals.''

Response: NMFS has received general comments from the public that whale watch vessels get close enough to the whales to cause a disturbance. While not all individuals have accurate knowledge of how close a vessel comes to a whale, the general public is often in a position to observe the activities of whale watch vessels and the resultant behavior of whales on a routine basis. Based on these observations, many people, including those in the industry

and those familiar with boat operation, and with whale behavior in Alaska, have expressed the view to the Alaska Region that vessels are operating too closely to the whales, resulting in disturbance to the animals.

Comment 36: A commenter stated that it is important not to generalize the results of whale/vessel interactions from one area or habitat type to another.

Response: NMFS recognizes that some variation in whale response may exist under different circumstances. However, NMFS has utilized the best available data to support the decision, including data from a study of humpback whales in Glacier Bay National Park and Preserve, which is within the larger area affected by this final rule. The data from that study demonstrate behavioral changes in whales in response to vessel proximity. Given the direct relevance of this study to the animals that are to be protected, consideration of these data are appropriate in formulating management strategies for Alaska.

Comment 37: One commenter asserted that the statement in the EA that ''whales exhibit a great degree of site fidelity on their feeding grounds'' is misleading. The commenter asserts that humpback whale site-fidelity occurs with respect to large-scale population structure site fidelity and not on a smaller site-specific scale.

Response: Humpback whales returning to Alaska to feed exhibit site-fidelity on a regional basis (i.e., generalized feeding area fidelity such as returns to southeast Alaska) as well as on a more localized site-specific basis (i.e., they feed specifically off of a certain point of land) (Straley 1994, J. Straley, *pers. comm.*). Regional site fidelity occurs with animals who return to the same general feeding areas of, for example, Southeast Alaska, Prince William Sound or the Kodiak area. Site-specific fidelity does occur on a more local level (J. Straley, *pers. comm.*). For example, some animals return repeatedly to the same limited stretch of coastline near Pt. Adolphus or Glacier Bay to feed. A similar kind of site-fidelity occurs for other areas within a greater feeding region.

Comment 38: One commenter supported the discontinuation of whale watch activities if these activities invoke a dramatic change in the whales' behavior.

Response: NMFS concurs. However, no evidence exists that whale watching has resulted in a ''dramatic'' change in whale behavior. Current statutory language does prohibit an activity that disturbs or causes changes in normal behavior. Current regulations are intended to manage whale watch vessels so that these vessels do not cause changes in the whales' behavior, i.e., disturb or ''take'' a whale. NMFS believes that the new regulations will allow appropriate whale watching to occur without disturbing the animals.

Comment 39: NMFS does not make accommodations for situations in which whales approach a vessel.

Response: NMFS specifies in the preamble to the proposed rule, and in the accompanying EA, that should a whale approach a vessel within the minimum approach distance, NMFS would not require the vessel to undertake avoidance measures. NMFS recognizes that situations occur in which the whales approach the vessel under their own volition. For reasons outlined in Comment 11, NMFS is not requiring vessels to undertake avoidance measures in such instances.

Comment 40: No evidence has been presented that the Marine Mammal Viewing Guidelines, when complied with, are insufficient for minimizing disturbance to the whales.

Response: Compliance with the Guidelines should result in minimizing disturbance to whales. However, sufficient non-compliance occurs to the extent that NMFS believes that regulatory measures are necessary. The new regulatory measures are consistent with the Guidelines. These combined measures should provide protection to humpback whales.

Comment 41: The proposed distance will make photo-identification data impossible to collect. The commenter notes that bona fide researchers should have NMFS research permits but that whale watchers can make a valuable contribution to such studies.

Response: NMFS did not adopt the proposed distance of 200 yds (182.8 m) and instead adopted a distance of 100 yds (91.4 m), the same distance as the voluntary guidelines. Therefore, the NMFS regulation should not have any effect on the status quo collection of photo-identification data.

Classification

The Administrator, Alaska Region, NMFS, determined that this rule is necessary for conservation and management and is consistent with the Endangered Species Act and the Marine Mammal Protection Act.

NMFS prepared a final regulatory flexibility analysis (FRFA). A copy of this analysis is available from NMFS (see **ADDRESSES**). A summary of the FRFA follows:

(1) Vessel-based disturbance of humpback whales is currently a problem in waters off Alaska. The MMPA and ESA prohibit the ''take,'' including harassment, of humpback whales and other marine mammals. Recognizing harassment potential, from the perspective of the vessel operator, and proving a case of harassment, from the enforcement perspective, is often difficult. NMFS, Alaska Region, therefore, implemented Marine Mammal Viewing Guidelines to provide a structure for voluntary action to prevent disturbance to marine mammals, including humpback whales, in waters off Alaska. Voluntary compliance is not achieving the Agency's conservation and management objectives. The measures implemented by this final rule will provide protection from harassment to humpback whales. (For additional detail, refer to Section 3.1 of the EA).

(2) The public commented that a regulation stricter than the 100-yd (91.4-m) voluntary guideline, such as the proposed 200-yd (182.8-m) restriction, could diminish passengers' satisfaction with the whale watch tour and hence future clientele. However, the agency has chosen to implement a 100-yd (91.4-m) minimum approach distance, which is the same as the present voluntary guidelines and which, therefore, would not affect business in the manner perceived.

(3) Although whale watching activities have been going on for some time in some areas of Alaska, the pressure has been at a level much lower than that which exists currently. Although not comprehensive, some data on the whale watch industry are available. Commercial Fisheries Entry Commission (CFEC) of the State of Alaska gathers data on charter vessels. These data represent the number of vessels in Alaska that register as charter fishing vessels. Some of the fishing charter fleet also offer whale watch charters; the CFEC statistic does not, however, include those vessels that conduct exclusively whale watching charters. In 1998, 3,670 vessels were registered as charter fishing vessels, an increase of 212 percent from 1988 (CFEC 1999). While this is not a direct measure of the universe of whale watching charters, the overlap between the charter fishing industry and the whale watching charter industry indicates that the number of charter vessels that could potentially interact with humpback whales is growing. This statistic also shows a significant increase in the charter industry over the last 10 years.

The U.S. Coast Guard state vessel registration program records all vessels under 5 net tons operating in Alaska waters. Data from 1999 indicate a total of 34,353 active vessels. This includes

2,171 commercial passenger vessels, 4,809 commercial fishing vessels, 660 rental vessels, 24,462 pleasure vessels and 1,226 in the ''other'' category. Some portion of the commercial passenger vessels are used for whale watching activities. Most of the remaining vessels could potentially interact with whales; the degree of interaction is likely to be minimal, except perhaps for pleasure craft whose operation can be directed at humpback whales. The majority of the 34,353 vessels, however, likely operate in coastal waters, overlapping to some extent with the range of the humpback whale. Although NMFS does not have information on specific vessel use patterns, the number of vessels that could interact with humpback whales has increased substantially in recent years and is likely to continue to grow.

The impact of the current level of viewing pressure, or an increased viewing pressure, may not be fully understood for many years. The risk of harm to the species from a possible delay in detecting a long-term negative response to increased pressure provides impetus to implement measures on a precautionary basis to manage vessel interaction with humpback whales in waters off Alaska.

Quantitative data from potentially affected vessel operators are not available for NMFS to precisely determine whether the affected industry sectors are small entities or not. These data are not available because the charter industry is largely unregulated and no statistics are recorded on the nature of charter operations. A qualitative assessment of the types of vessels that would be impacted indicates that the dedicated whale watch and charter vessels would be most probably directly impacted and also most likely are ''small entities,'' consistent with the SBA definitions.

For purposes of the FRFA, all whale watch vessels are conservatively assumed to be ''small entities'' within the meaning of the Regulatory Flexibility Act.

(4) The rule does not contain reporting, recordkeeping and other compliance requirements.

(5) Instead of a 200-yd (182.8-m) minimum approach distance, NMFS has chosen to implement a 100-yd (91.4-m) minimum approach distance which is the same as the present voluntary guidelines, and which would, therefore, minimize to the maximum extent possible any negative economic impact that may have occurred under the proposed rule. The industry asserts that it complies with the present 100-yd (91.4-m) voluntary guideline. Accordingly, the 100-yd (91.4-m) mandatory approach distance should have no effect on the industry. Although a variety of less restrictive measures were examined, none were selected because they would not have provided an appropriate level of protection for the whales. A variety of more restrictive measures were examined, including the proposed 200-yd (182.8-m) approach restriction, and while they would have provided a greater level of protection for the whales, they were rejected because they would have caused a greater cost to the industry.

This rule has been determined to be not significant for purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 224

Endangered and threatened species, Reporting and record keeping requirements.

Dated: May 23, 2001.

John Oliver,

Acting Deputy Assistant Administrator for Management and Administration, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 224 is amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531-1543 and 16 U.S.C. 1361 *et seq.*

2. In § 224.103, paragraphs (b) and (c) are redesignated as paragraphs (c) and (d), respectively, and a new paragraph (b) is added to read as follows:

§ 224.103 Special prohibitions for endangered marine mammals.

* * * * *

(b) *Approaching humpback whales in Alaska*—(1) *Prohibitions.* Except as provided under paragraph (b)(2) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of Alaska, or within inland waters of the state, any of the acts in paragraphs (b)(1)(i) through (b)(1)(iii) of this section with respect to humpback whales (*Megaptera novaeangliae*):

(i) Approach, by any means, including by interception (i.e., placing a vessel in the path of an oncoming humpback whale so that the whale surfaces within 100 yards (91.4 m) of the vessel), within 100 yards (91.4 m) of any humpback whale;

(ii) Cause a vessel or other object to approach within 100 yards (91.4 m) of a humpback whale; or

(iii) Disrupt the normal behavior or prior activity of a whale by any other act or omission, as described in paragraph (a)(4) of this section.

(2)*Exceptions.* The following exceptions apply to this paragraph (b), but any person who claims the applicability of an exception has the burden of proving that the exception applies:

(i) Paragraph (b)(1) of this section does not apply if an approach is authorized by the National Marine Fisheries Service through a permit issued under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar authorization.

(ii) Paragraph (b)(1) of this section does not apply to the extent that a vessel is restricted in her ability to maneuver and, because of the restriction, cannot comply with paragraph (b)(1) of this section.

(iii) Paragraph (b)(1) of this section does not apply to commercial fishing vessels lawfully engaged in actively setting, retrieving or closely tending commercial fishing gear. For purposes of this paragraph (b), commercial fishing means taking or harvesting fish or fishery resources to sell, barter, or trade. Commercial fishing does not include commercial passenger fishing operations (i.e. charter operations or sport fishing activities).

(iv) Paragraph (b)(1) of this section does not apply to state, local, or Federal government vessels operating in the course of official duty.

(v) Paragraph (b)(1) of this section does not affect the rights of Alaska Natives under 16 U.S.C. 1539(e).

(vi) These regulations shall not take precedence over any more restrictive conflicting Federal regulation pertaining to humpback whales, including the regulations at 36 CFR 13.65 that pertain specifically to the waters of Glacier Bay National Park and Preserve.

(3) *General measures.* Notwithstanding the prohibitions and exceptions in paragraphs (b)(1) and (2) of this section, to avoid collisions with humpback whales, vessels must operate at a slow, safe speed when near a humpback whale. ''Safe speed'' has the same meaning as the term is defined in 33 U.S.C. 2006 and the International Regulations for Preventing Collisions at Sea 1972 (see 33 U.S.C. 1602), with respect to avoiding collisions with humpback whales.

* * * * *

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