

a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. Since it would only delay the effective date of a final rule, if made final, this NPRM would not impose any new collection of information requirements for which a 5 CFR part 1320 clearance must be obtained.

#### D. National Environmental Policy Act

We have analyzed this proposed rule for the purposes of the National Environmental Policy Act. We have determined that implementation of this action would not have any significant impact on the quality of the human environment.

#### E. Executive Order 13132, Federalism

This proposed rule would 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, as specified in Executive Order 13132.

#### F. Civil Justice Reform

This proposed rule would not have any retroactive effect. A petition for reconsideration or other administrative proceedings are not required before parties may file suit in court.

#### G. Unfunded Mandates Reform Act

If made final, this proposed rule would not result in costs of \$100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act.

**Authority:** 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: November 7, 2006.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 060928250-6250-01; I.D. 092506A]

RIN 0648-AU90

#### Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes to revise the regulations implementing the Atlantic Large Whale Take Reduction Plan (ALWTRP) by expanding the southeast U.S. restricted area and modifying regulations pertaining to gillnetting within the southeast U.S. restricted area. NMFS proposes to prohibit gillnet fishing or gillnet possession during annual restricted periods associated with the right whale calving season. Exemptions to the fishing prohibitions are proposed for strikenet fishing for sharks and gillnet fishing for Spanish mackerel south of 29°00' N. lat. An exemption to the possession prohibition is proposed for transiting through the area if gear is stowed in accordance with this rule. This action is required to meet the goals of the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). This action is necessary to protect northern right whales from serious injury or mortality from entanglement in gillnet gear in their calving area in Atlantic ocean waters off the Southeast U.S.

**DATES:** Comments on this proposed rule must be received by 5 p.m. EST on December 15, 2006.

**ADDRESSES:** You may submit comments, identified by the RIN 0648-AU90, by any of the following methods:

E-mail: [sewhalerule.comments@noaa.gov](mailto:sewhalerule.comments@noaa.gov). Include RIN 0648-AU90 in the subject line of the message.

Mail: Assistant Regional Administrator for Protected Resources, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Facsimile (fax) to: 727 824-5309, Attn: Assistant Regional Administrator, Protected Resources, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the

instructions for submitting comments. Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this proposed rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document. Copies of the draft Environmental Assessment (EA), an Initial Regulatory Flexibility Analysis (IRFA), and copies of all citations referenced in this proposed rulemaking may be obtained from the persons listed under **FOR FURTHER INFORMATION CONTACT**.

**FOR FURTHER INFORMATION CONTACT:** Laura Engleby, 727-824-5312, or Barb Zoodsma, 904-321-2806. Individuals who use telecommunications devices for the deaf (TDD) may call the Federal Information Relay Service at 1-800-877-8339 between 8 a.m. and 4 p.m. eastern time, Monday through Friday, excluding Federal holidays.

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

The northern right whale has been listed as endangered under the ESA since the Act's passage in 1973 (35 FR 8495, June 2, 1970). In June 1994, NMFS designated three areas of the right whale's Atlantic 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 (27.8 km), and the coastal waters between 30°15' N. lat. and 28°00' N. lat. from the coast out 5 nautical miles (9.3 km) (§ 226.203 of this chapter).

As required by the ESA, NMFS developed a recovery plan for the northern right whale in 1991, which was revised and updated in 2001 and 2005. The current recovery plan states,

“the most immediate need for the North Atlantic right whale is to reduce or eliminate human-related deaths and injuries” (NMFS 2005). Furthermore, the development and implementation of strategies to modify fishing operations and gear to reduce the likelihood of entanglement, mitigate the effect of entanglements, enhance the possibility of disentangling, and assess the effectiveness of such strategies is a priority one recovery task, i.e., “an action that must be taken to prevent extinction or to prevent the species from declining irreversibly” (NMFS 2005, p. V–1).

Northern right whales in the North Atlantic occur in coastal and nearshore waters off the eastern United States and Canada, areas also used by fishing and other maritime activities that can adversely affect the species. Deaths from collisions with ships and entanglement in fishing gear are significant impediments to the recovery of the species. From 1999 to 2003, human-caused mortality and serious injury to northern right whales in the North Atlantic from fishery entanglements and ship strikes were estimated as an average of 2.6 whales per year (U.S. waters, 1.6; Canadian waters, 1.0) (Waring *et al.*, 2006). A serious injury has been defined as “any injury that will likely result in mortality” (§ 216.3 of this chapter). Kraus *et al.* (2005) indicated that the overall mortality rate for North Atlantic right whales increased between 1980 and 1998 to a level of at least four percent per year, a rate that is not sustainable. The 1994 amendments to the MMPA mandate that, as part of the Stock Assessment Reports, Potential Biological Removal (PBR) estimates must be determined for each marine mammal stock in U.S. waters. PBR is defined as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” The PBR level for right whales is zero; thus, any mortality or serious injury to the species is considered significant.

Serious injury and mortality of right whales as a result of commercial fishing activities continues to occur at a rate above PBR. From 1999–2003, Waring *et al.* (2006) documented 31 reports of entanglements that resulted in 5 serious injuries and 3 mortalities, for an average of 1.6 mortalities and serious injuries per year over that time period.

To reduce serious injury and mortality of marine mammal stocks incidental to commercial fishing operations, MMPA section 118(f) directs

NMFS to develop and implement take reduction plans (TRPs) 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. Marine mammals listed under the ESA, such as right whales, are automatically considered strategic stocks under the MMPA.

On August 6, 1996 (61 FR 40819), NMFS established the Atlantic Large Whale Take Reduction Team (ALWTRT) to prepare a draft TRP to reduce serious injury and mortality of right, humpback, and fin whales incidental to 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. Pursuant to the MMPA, NMFS then developed a final ALWTRP and implementing regulations based, in part, on the deliberations of the ALWTRT and 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 that time, the ALWTRP has been modified several times to include additional measures designed to reduce the serious injury and mortality of large whales in commercial fisheries.

The ALWTRP, codified at 50 CFR 229.32 of this chapter, relies on a combination of fishing gear modifications, gear handling and deployment requirements, and time/area closures to reduce the risk of large whales becoming entangled in commercial fishing gear. Among these measures are specific provisions relevant to the risks posed to right, humpback, and fin whales by commercial fishing operations.

Commercial fisheries operating in the Southeast U.S. that are regulated under the ALWTRP include the Southeastern U.S. Atlantic shark gillnet and the Southeast Atlantic gillnet fisheries (see List of Fisheries, 71 FR 48802, August 22, 2006, for current descriptions). Both fisheries are classified as Category II fisheries because they have occasional serious injuries and mortalities of marine mammals; Category II fisheries are those for which the annual mortality and serious injury of a marine mammal stock is greater than 1 percent and less than 50 percent of the stock’s PBR (50 CFR 229.2).

The Southeastern U.S. Atlantic shark gillnet fishery uses large mesh (5–10 inches (0.127–0.254 m)) nets, typically more than 1,500 ft (457 m) long, to target large and small coastal sharks. The fishery has traditionally employed drift nets that are set for more than 10 hours. The fishery also deploys strikenets in which schools of sharks are targeted and encircled, and recently has also started targeting sharks with bottom set sink or stab nets (see definitions of gear types at § 229.2). The fishery has traditionally operated in coastal waters of Florida and Georgia. The shark gillnet fishery is managed by NMFS under the Fishery Management Plan (FMP) for Atlantic Tunas, Swordfish, and Sharks (implementing regulations at 50 CFR part 635). Fishermen possessing or landing sharks in excess of the recreational retention limit must have either a NMFS-issued shark directed limited access permit or a shark incidental limited access permit (50 CFR 635.4(e)). The classification of this fishery as a Category II fishery is driven by observed incidental mortalities of the Western North Atlantic coastal stock of bottlenose dolphins. In addition, a right whale calf was observed in 1994 with wounds indicative of an interaction with gillnet gear in the area where this fishery operates. The calf was sighted only once and presumed dead (60 FR 67073, December 28, 1995).

The Southeast Atlantic gillnet fishery is a small mesh (<5 inches (12.7 cm)) fishery that may deploy either pelagic (mid-water) or demersal (bottom) gillnets. The fishery operates primarily in Federal waters from South Carolina to Florida, due to prohibitions on gillnets in each of these coastal states. The fishery is dynamic and fishermen may alter the configuration or mesh size of their gear at different times of the year in order to target different species. The broad variety of fish species landed in this fishery was recently recognized in the 2006 Final List of Fisheries (71 FR 48802, August 22, 2006) as including king mackerel, Spanish mackerel, whiting, bluefish, pompano, spot, croaker, little tunny, bonita, jack crevalle, and cobia. Spanish mackerel is the primary species targeted by gillnets off the Florida east coast (Gulf of Mexico Fishery Management Council *et al.*, 2004). Spanish mackerel gillnet fishing uses primarily sink nets, and the fishery is active off the east coast of Florida between Ft. Pierce to just north of Cape Canaveral during the months of October through March. NMFS-issued commercial vessel permits are required to fish for Spanish mackerel (§ 622.4(a)(2)(iv) of this title), as part of

the FMP for Coastal Migratory Pelagic Resources (implementing regulations at 50 CFR 622). Regulations for Spanish mackerel gillnet fishing at § 622.41(c)(3)(ii) of this title include restricting the soak period to no more than one hour, allowing only one gillnet to be fished, set or placed in the water at any one time, and restricting the float line to no longer than 800 yards (732 m). Gillnet gear is not an authorized gear type for directed harvest of king mackerel, little tunny, bluefish, cobia, or snapper-grouper (including jack crevalle) in waters off South Carolina, Georgia or Florida's Atlantic coast (§ 622.41(c)(1) and (d)(1) of this title); landings of these species therefore represent incidental catches. Gillnet fishing for whiting occurs primarily off Mayport, Florida, using multiple sections of net, each approximately 300 yards (274 m) long, for a total of up to 2,800 yards (2,560 m) of gillnet per vessel. Nets are set on the bottom with a height of up to 4 feet (1.13 m). Soak times are up to six hours and net soaks may extend into or over night. Pursuant to 50 CFR 229.2, the classification of the Southeast Atlantic gillnet fishery as a Category II fishery is based on an evaluation of the risk of serious injury and mortality that gillnets present to marine mammals that are found in the area of operation of this fishery, and from indications that at least occasional serious injuries and mortalities occur in this fishery, as evidenced by reports of strandings of Western North Atlantic coastal bottlenose dolphin from 1994–1998 in the area of operation of this fishery (66 FR 6551, January 22, 2001).

No other gillnet fisheries are known to operate in the Southeast U.S. restricted area and during the time when calving and nursing right whales are expected to occur.

The southeast U.S. restricted area is defined in § 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. NMFS also established the southeast U.S. observer area defined 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. restricted area, the restricted period is from November 15 through March 31 (50 CFR 229.32(f)(4)(i)) corresponding with the right whale calving season, as it was understood in 1996. Pursuant to 50 CFR 229.32(f)(4)(ii) and (iv), fishermen are prohibited from using shark gillnet gear,

defined at § 229.2 as gillnet with 5 inches (12.7 cm) or greater stretch mesh, in the restricted area during the restricted period, except for shark fishing with strikenet gear (defined at § 229.2) of any mesh size fished in accordance with the following provisions: (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 (5.6 km) of a right, humpback, or fin whale, and (4) if a right, humpback, or fin whale moves within 3 nautical miles (5.6 km) of the set gear, the gear is removed immediately from the water (§ 229.32(f)(4)(iv)). Lastly, all gillnet fishermen are prohibited from fishing a straight set of gillnet gear at night within the southeast U.S. restricted area during the restricted period (§ 229.32(f)(4)(iii)).

In the southeast U.S. observer area, the ALWTRP regulations require observer coverage, if requested by NMFS, of the Southeastern U.S. Atlantic shark gillnet fishery during the restricted period (§ 229.32(f)(3)).

Because of the right whale's endangered status, NMFS included contingency measures in the ALWTRP regulations that would require 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 during specific times of the year. Specifically, § 229.32(g)(1) states that if a serious injury or mortality of a right whale occurs in the southeast U.S. restricted area during the restricted period as a result of an entanglement by gillnet gear allowed to be used in that area and time, the NOAA Assistant Administrator for Fisheries (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 under 50 CFR 229.32(g)(2).

The AA is authorized to preempt or alter closures implemented under 50 CFR 229.32(g)(1) in subsequent years based on any of the following: (1) NMFS verifies that certain gear characteristics are both operationally effective and reduce serious injuries and mortalities of endangered whales, (2) new gear technology is developed and determined to be appropriate, (3) revised fishing gear breaking strengths are determined to be appropriate, (4) new marking systems are developed and determined to be appropriate, (5) NMFS determines that right whales are remaining longer than expected in a

closed area or have left earlier than expected, (6) NMFS determines that the boundaries of a closed area are not appropriate, (7) gear testing operations are considered appropriate, or (8) similar situations occur (50 CFR 229.32(g)(2)).

In 2005, the ALWTRT considered additional measures to further protect right whales from serious injury and mortality in commercial fishing operations, including in Southeast U.S. waters, and NMFS published a proposed rule on June 21, 2005 (70 FR 35894). NMFS prepared a Draft Environmental Impact Statement (DEIS), and under the preferred alternatives, the following ALWTRP operational measures, specific to the southeast U.S. restricted area and adjacent waters, were proposed (for a complete list, please consult the 2005 DEIS (Industrial Economics, Inc. and NMFS 2005)):

(1) Dividing, at the 29°00' N. lat., the southeast U.S. restricted area into two sections.

(2) Modifying the restricted period to November 15 through April 15 for the southeast U.S. restricted area north of 29°00' N. lat., and December 1 through March 31 for the southeast U.S. restricted area south of 29°00' N. lat.

(3) Eliminating the 80°00' eastern boundary of the southeast U.S. restricted area and extending the area, and respective requirements, out to the Exclusive Economic Zone (EEZ).

(4) Requiring weak links, sinking or neutrally buoyant groundline, no floating buoy line at the surface of the water, and anchors for gillnets not returned to port with the vessel in the Southeast Atlantic gillnet fishery.

(5) Requiring Vessel Monitoring Systems (VMS) in lieu of ALWTRP-related observer coverage requirements for the Southeastern U.S. Atlantic shark gillnet fishery.

The final rule is expected to be published in early 2007. NMFS recognizes that some of the measures in the 2005 proposed rule and some of the measures proposed in this rulemaking concerning the boundaries of the Southeast U.S. restricted area differ in some respects. NMFS will ensure that the differences are reconciled when completing both rulemakings.

#### Recent Events

On January 22, 2006, a dead right whale calf was reported offshore of Jacksonville Beach, Florida. The right whale calf was towed ashore and necropsied by a specialized large whale necropsy team. Evidence of recent entanglement was clearly documented by the necropsy team. Damage to the animal that was judged to be the result

of entanglement met NMFS' criteria of a serious injury (i.e., an injury likely to result in mortality) (50 CFR 216.3). The immediate cause of the whale's death (e.g., dehydration, infection) was not determined by the necropsy team. NMFS determined, based on best available information and discussions with scientific investigators, that the right whale's entanglement and serious injury by gillnet gear allowed to be used in the southeast U.S. restricted area during the restricted period ultimately led to the death of the animal. Additionally, NMFS determined that both the entanglement and death of the whale occurred within the southeast U.S. restricted area during the restricted period because: (1) all sightings of this calf occurred within the southeast U.S. restricted area; (2) all the southeast sightings were during the restricted period; (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) based on currents, the calf's most likely location when it died was inshore and north of where the carcass was found.

As a result of these findings, NMFS enacted temporary restrictions on gillnet fishing in the southeast U.S. restricted area from February 15, 2006, through March 31, 2006 (71 FR 8223, February 16, 2006), in accordance with the ALWTRP's implementing regulations at 50 CFR 229.32(g)(1). The temporary regulation was necessary to protect right whales from further serious injury or mortality in the southeast U.S. restricted area due to entanglement in gillnet gear. Since implementing this regulation, NMFS has collected and analyzed additional information to determine, with opportunity for public comment, the scope of permanent protective measures required by the regulations.

On March 7, 2006, a final necropsy report for the dead calf was made available to NMFS. The necropsy report supported NMFS' determination that the right whale calf was seriously injured and ultimately died as a result of entanglement in gillnet gear used in the southeast U.S. restricted area during the restricted period. The mesh size of the gillnet gear involved in the entanglement could not be determined. Various mesh sizes are used within the area, subject to different restrictions established under the ALWTRP regulations, regulations established under fishery management plans, and applicable state authorities.

Therefore, NMFS believes the application of the implementing regulations at § 229.32(g)(1) with respect

to the January 2006 right whale death was, and continues to be, appropriate.

On April 11 and 12, 2006, NMFS convened a meeting of the ALWTRP's Mid-Atlantic/Southeast Subgroup (the SE Subgroup) to seek input regarding future management options to protect right whales from additional serious injury and mortality from gillnetting within the southeast U.S. restricted area. Attending the SE Subgroup meeting were representatives of commercial fishermen that actively gillnet in the Southeast U.S., right whale scientists, environmentalists, Marine Mammal Commission, fishery management organizations, and state and Federal resource management agencies.

NMFS updated the SE Subgroup on: (1) the ALWTRP as it relates to the Southeast U.S. (including modifications proposed in 70 FR 35894, June 21, 2005), (2) the right whale calf necropsy findings, (3) the temporary rule restricting gillnetting in the southeast U.S. restricted area from February 16, 2006, through March 31, 2006 (71 FR 8223, February 16, 2006), (4) right whale status, (5) habitat and diving characteristics of right whales in the Southeast U.S., (6) Southeast U.S. gillnet fisheries, and (7) existing gillnet-related state and Federal regulations. Various questions and issues raised during the meeting included: (1) the need to improve how right whale carcasses are handled, (2) the method by which new management measures would be implemented, (3) the lack of information regarding the precise mesh size of the entangling gillnet implicated in the calf's death, (4) allegations that illegal gillnetting was responsible for the calf's death, (5) the lack of resources to enforce management restrictions, (6) the inadequacy of regulations regarding fishing activities not previously considered, (7) the lack of scientific permits that allow tagging right whale mothers with calves in the Southeast U.S. to study, among other things, dive profiles, (8) the belief that, due to risk to the whales, gillnetting is not compatible with a right whale calving area, and (9) the fact that PBR for right whales is zero.

The SE Subgroup discussed various gillnet fishery management options for the southeast U.S. restricted area, including using 29°00' N. lat. to divide the southeast U.S. restricted area into northern and southern management zones, consistent with the ALWTRP proposed rule (70 FR 35894, June 21, 2005). This management approach was advocated due to the different types of fishing operations in these two areas, and to allow for better tracking of management measures relative to the

seasonal movements of right whales as they progress southward along Florida during late fall/early winter and progressively northward during late winter/early spring.

*Southeast U.S. restricted area south of 29°00' N. lat.* The SE Subgroup recommended management measures for the southeast U.S. restricted area south of 29°00' N. lat. that they believed would protect right whales from serious injury and mortality in commercial gillnet gear. The recommendation included a combination of retaining some of the existing ALWTRP regulations for the two currently active gillnet fisheries operating in the area and supplementing them with new or modified requirements. For the Southeastern U.S. Atlantic shark gillnet fishery, the SE Subgroup recommended: modifying the existing restricted period of November 15 through March 31 to December 1 through March 31; revising the existing prohibition on shark gillnetting with 5 inches (12.7 cm) or greater stretch mesh to a prohibition on shark gillnetting with any size mesh during the restricted period; and retaining the exemptions at § 229.32(f)(iv) for the use of strikenet gear to target sharks during the restricted period.

For the Southeast Atlantic gillnet fishery, the SE Subgroup recommended modifying the existing restricted period of November 15 through March 31 to December 1 through March 31; and revising the prohibition on straight sets of gillnet at night to a prohibition on fishing with gillnet with an exemption for fishing for Spanish mackerel during the periods December 1 through December 31 and March 1 through March 31, if fishing was conducted in accordance with the current Spanish mackerel regulations at 50 CFR part 622 and these regulations are codified within the ALWTRP (to ensure against the possibility that regulations at 50 CFR part 622 are changed through FMP amendments). To be consistent with the shark strikenet provisions and to provide additional protection for right whales, the following new provisions would also be required for fishing for Spanish mackerel in the southeast U.S. restricted area south of 29°00' N. lat. during the suggested restricted period: (1) No net is set at night or when visibility is less than 500 yards (460 m); (2) no net is set within 3 nautical miles (5.6 km) of a right, humpback, or fin whale; and (3) gillnet is removed immediately from the water if a right, humpback, or fin whale moves within 3 nautical miles (5.6 km) of the set gear.

The SE Subgroup's recommended measures for the Southeastern U.S.

Atlantic shark gillnet fishery and the Southeast Atlantic gillnet fishery would prohibit fishing with gillnet unless the specified restrictions were in place for each of these two fisheries to provide protection for right whales. The provisions for Spanish mackerel fishing and strikenetting for sharks allow fishing with limited amounts of gillnet (due to Spanish mackerel regulations and strikenet deployment method) and limited soak times, and therefore keep effort per fisherman relatively low overall. Furthermore, nets would not be set, or would be removed, if endangered whales were within 3 nautical miles (5.6 km) of deployed gear.

*Southeast U.S. restricted area north of 29°00' N. lat.* The SE Subgroup did not reach consensus on recommended management measures for the southeast U.S. restricted area north of 29°00' N. lat. The subgroup recognized that the area north of 29°00' N. lat. has a higher density of right whales for a longer period during the calving season. In 2004, a small group of gillnet fishermen targeting whiting also began using this area. The SE Subgroup discussed possible options for management measures in this area, including: (1) status quo with certain measures that would allow gear and techniques used to gillnet whiting, but limit gillnetting for other species (e.g., require gillnets with a maximum stretched-mesh size of 3 inches (7.6 cm) and less than 25 meshes deep), (2) prohibit gillnetting in this area unless strikenetting, (3) prohibit gillnetting in this area altogether, and (4) prohibit gillnetting in portions of the area. Possible closed areas included the entire southeast U.S. restricted area; the right whale critical habitat area; the Mandatory Ship Reporting System (MSRS) Area (the area extends from the shoreline east to 80°51.6' W. long. with the southern and northern boundaries at 30°00' N. lat. and 31°27' N. lat., respectively) (33 CFR part 169); and an area from the shoreline out to a line drawn at approximately 81° W. long. extending from approximately Savannah, Georgia, to Daytona Beach, Florida (the area suspected by some SE Subgroup members to include high concentrations of right whales not included in the other area proposals). Some fishing industry members of the SE Subgroup noted that none of these closed area options would allow them to fish safely, efficiently, or effectively.

Following the SE Subgroup meeting, a report summarizing key points of the SE Subgroup's meeting was prepared and distributed to the full ALWTRT. Comments received from SE Subgroup members after the meeting were made

available to ALWTRT members upon request.

Subsequent to the SE Subgroup meeting, the Marine Mammal Commission (MMC) submitted a letter to NMFS recommending that NMFS promulgate a permanent rule to ensure protection of mother-calf pairs of right whales from entanglement in gillnet fisheries. The MMC is charged under the MMPA with recommending actions and policies to Federal agencies with respect to marine mammal protection and conservation. In their letter, dated May 15, 2006, the MMC recommended to NMFS that the rule: (1) expand the southeast U.S. restricted area to include waters within 40 miles (74.1 km) offshore of northern Georgia and South Carolina, (2) modify the restricted period to be from November 1 to April 30 in the restricted area off South Carolina, and November 15 to April 15 in the restricted area off Georgia and Florida, (3) prohibit all gillnet fishing in the expanded restricted area during the recommended restricted periods, and (4) provide exemptions for Spanish mackerel and shark gillnet fishing in the southeast U.S. restricted area south of 29°00' N. lat.

#### **NMFS Analysis of Need for Additional Action**

Prior to implementing the temporary rule (71 FR 8223, February 16, 2006) closing the southeast U.S. restricted area to gillnet fishing in February and March 2006, NMFS determined that the death of the right whale calf was the result of entanglement in gillnet gear allowed to be used in the southeast U.S. restricted area during the restricted period. NMFS has received additional information since that time; specifically, the final necropsy report and the discussions of the SE Subgroup. The new information supports NMFS' original determination. Therefore, ALWTRP regulations at § 229.32(g)(1) require the permanent closure of the southeast U.S. restricted area during the annual restricted period. However, a complete gillnet prohibition in the southeast U.S. restricted area can be avoided if certain conditions as specified under § 229.32(g)(2) exist. Consequently, NMFS analyzed whether it was appropriate to propose a revised permanent gillnet prohibition in the southeast U.S. restricted area in accordance with § 229.32(g)(1) and (2), and whether the management measures recommended by the SE Subgroup and the MMC were consistent with the measures in § 229.32(g)(2).

#### *Restricted Area*

As recommended by the MMC, NMFS considered expanding the southeast

U.S. restricted area to include waters off South Carolina. Aerial surveys for right whales conducted between 2001 and 2005 have shown consistent occurrence of right whales in waters off South Carolina throughout winter months (McLellan *et al.*, 2001; Glass *et al.*, 2005). In addition, there is evidence that some calving females may remain in this area north of the traditionally defined calving grounds. For example, during the 2004/2005 calving season, right whale #1970 and her calf were observed multiple times off South Carolina by an aerial monitoring team, but were never observed farther south off Georgia and Florida (Glass *et al.*, 2005). Acoustic monitoring conducted during 2004 and 2005 also indicated the presence of right whales off South Carolina during winter months, including detections of right whale vocalizations at a monitoring station approximately 30 miles (55.6 km) offshore (Clark, 2006). Furthermore, habitat models based on the aerial survey data collected off Florida and Georgia suggest a strong relationship between the spatial distribution of calving right whales and water temperature and bathymetry. In particular, distribution of calving right whales is strongly correlated with water temperatures between 13–15°C and water depths between 45–60 ft (15–20m) (Keller *et al.*, 2006; Garrison, 2006). These environmental conditions are typically found off South Carolina to distances of 35 nautical miles (64.8 km) from shore during winter months. The model predictions are consistent with observational evidence from aerial and acoustic surveys. The available data and analyses indicate that the continental shelf off South Carolina is a region where right whales occur on a consistent basis in winter months.

South Carolina commercial fisheries landings data (which distinguishes landings by gear-type since 2003) indicate that only shark has been landed in South Carolina from gillnet fishing, and only in 2004 and 2005. Shark was harvested off South Carolina by gillnet from April through October, 2004, and from May through September, 2005, for a total of 8,097 lbs (3,680 kg) and 18,318 lbs (8,326 kg) of shark harvested in 2004 and 2005, respectively. Commercial fisheries landings data from the Florida Fish and Wildlife Conservation Commission (FWC) indicate that in Florida, 111,210 lbs (50,444 kg) of shark were landed in 2004 alone. Consequently, expanding the southeast U.S. restricted area to waters off South Carolina would appear to only minimally impact the amount of shark

harvested in the Southeast if gillnetting is restricted or prohibited. However, the action would have conservation benefits to right whales by preventing the potential expansion of gillnetting activity into that area during the time when it is used by right whales. Therefore, in accordance with § 229.32(g)(2)(vi), NMFS has determined that the existing boundaries of the southeast U.S. restricted area are not appropriate, and that expanding the southeast U.S. restricted area to include the waters within 35 nautical miles (64.8 km) off South Carolina is necessary to prevent serious injury or mortality of right whales in that area (Figure 1).

As recommended by the MMC and consistent with recommendations of the SE Subgroup and with the 2005 ALWTRP proposed rule (70 FR 35894, June 21, 2005), NMFS also considered the appropriateness of managing the expanded southeast U.S. restricted area as two separate units divided at 29°00' N. lat. As indicated previously, fishermen participating in the SE Subgroup meeting indicated gillnet fishing practices north of 29°00' N. lat. differed substantially from those south of 29°00' N. lat. and preferred that these two areas be managed independently of each other. A review of the Right Whale Sightings Database, curated by the University of Rhode Island, indicates that right whales are rarely sighted south of 29°00' N. lat. in November or in April. However, right whales have been sighted throughout the area north of 29°00' N. lat. and extending north to the SC/NC border from mid-November through mid-April. NMFS has determined that splitting the southeast U.S. restricted area into two zones for purposes of managing gillnet threats to calving right whales is appropriate, as it would allow fishery management measures to temporally track right whale seasonal north-south movement patterns, thereby avoiding overly restrictive fishery management measures.

NMFS considered the SE Subgroup discussions regarding possible alternative restricted areas including: the right whale calving critical habitat area; the MSRS Area; and an area from the shoreline out to a line drawn at approximately 81° W. long. extending from about Savannah, Georgia, to Daytona Beach, Florida (the area suspected by some SE Subgroup members to include high concentrations of right whales not included in the other area proposals). In considering these options, NMFS reviewed available sightings data and habitat-modeling analyses relative to right whale

distribution in the Southeast U.S. (Keller *et al.*, 2006; Garrison, 2006). Right whales have routinely been observed outside of areas discussed for closure by the SE Subgroup, and habitat-modeling analyses, in particular, indicate that right whales are expected to occur outside of these areas due to suitable water temperature and bathymetry during winter. Reducing the size of the restricted area would leave right whales unprotected from gillnet fishing effort. Therefore, NMFS has determined it is not appropriate to use critical habitat, the MSRS Area, or the area west of 81° W. long. to manage gillnet fishing activity as per § 229.32(g)(1) and (2).

#### *Restricted Periods*

NMFS also considered whether right whales were remaining longer or leaving earlier than previously expected in the southeast U.S. restricted area, recognizing that a substantial amount of aerial survey data and opportunistic sightings of right whales had been collected since the ALWTRP was originally implemented in 1997. The November 15 through March 31 timeframe is currently established as the restricted period for the entire southeast U.S. restricted area. As indicated earlier, right whales are rarely sighted south of 29°00' N. lat. in November or in April; however, right whales have been sighted throughout the area north of 29°00' N. lat. and extending north to the SC/NC border from mid-November through mid-April. Consequently, in accordance with 50 CFR 229.32(g)(2)(v), NMFS has determined that it is appropriate to modify the annual restricted period to include two restricted periods specific to the proposed northern and southern zones of the southeast U.S. restricted area: November 15 through April 15 north of 29°00' N. lat., and to December 1 through March 31 south of 29°00' N. lat. This is consistent with NMFS' June 21, 2005, proposed rule to amend the ALWTRP (70 FR 35894).

#### *Prohibition of Gillnet Fishing in the Proposed Expanded Southeast U.S. Restricted Area During New Proposed Restricted Periods*

The southeast U.S. restricted area north of 29°00' N. lat. is the core of the calving area and used extensively by mother-calf right whale pairs during the restricted period. Although strikenetting for sharks and fishing for other species with small mesh gillnets is currently authorized under the ALWTRP in this area, fishing effort in this area appears to be limited primarily to fishermen using small mesh gillnets to target whiting, as part of the Southeast

Atlantic gillnet fishery. Therefore, this is the only gillnet fishery operation NMFS analyzed for a potential exemption to the prohibition under the provision of § 229.32(g)(2) for the southeast U.S. restricted area north of 29°00' N. lat. NMFS did not consider exemptions for fisheries using gear or methods already prohibited under ALWTRP regulations, including drift gillnetting for shark (62 FR 39157, July 22, 1997).

Gillnet fishing for whiting is concentrated in the vicinity of the St. John's River entrances, near the location where the entangled, dead right whale calf was first reported. Gear and operational restrictions for gillnet fishing in this area discussed by the SE Subgroup, such as limiting nets to less than 3 inches (7.6 cm) stretched mesh and no more than 25 meshes deep, using weak links, and prohibiting night time sets, would effectively restrict gillnet fishing in this area to only the methods used to target whiting. These measures are not operationally effective to adequately reduce risk to right whales since large amounts of net would still be allowed to be in the water, fishing for whiting is not subject to any Federal FMP that would restrict future increases in fishing effort or landings, it is unknown if weak links will release very young calves, and vertical lines are thought to present a risk to right whales. NMFS considered whether other special conditions exist or could be imposed on the whiting fishery to allow for a revision of the closed area as provided under § 229.32(g)(1) and (2). Weak links are used for reducing the threat of entanglement to large whales; however, NMFS is concerned that this or other technology may not sufficiently reduce risk to right whale calves from entanglement in gillnet gear due to the substantially smaller size and reduced strength of young right whale calves relative to adults. Similarly, the appropriate breaking strength suitable for freeing small right whale calves from entangling gillnet gear is unknown. Gear marking may be helpful to facilitate monitoring right whale entanglement rates or assist in designing future bycatch reduction measures; however, it will not reduce the risk to right whales from becoming entangled in the marked gear. Gear testing may hold promise for reducing serious injury or mortality to right whales in the southeast U.S. restricted area from gillnet fishing activity in the future, but gear testing, if implemented at present, will not reduce the immediate risk of serious injury and mortality to right whales incidental to gillnet fishing activity in the proposed

expanded southeast U.S. restricted area during the restricted period. Thus, NMFS has determined, consistent with § 229.32(g)(2), that no measures currently available would adequately protect right whales from the risk of serious injury or mortality due to gillnet operations during the restricted period in the southeast U.S. restricted area north of 29°00' N. lat. Therefore, NMFS proposes to prohibit fishing with or possessing gillnet during the restricted period in the proposed expanded southeast U.S. restricted area north of 29°00' N. lat.

NMFS also proposes to prohibit fishing with gillnets during the restricted period in the proposed expanded southeast U.S. restricted area south of 29°00' N. lat. The only fisheries currently active in this area during the restricted period are the strikenet component of the Southeastern U.S. Atlantic shark gillnet fishery and the Spanish mackerel component of the Southeast Atlantic gillnet fishery. Therefore, these are the only two gillnet operations NMFS considered for a potential exemption pursuant to § 229.32(g)(2). NMFS is proposing to exempt these operations from the gillnet prohibitions, with additional restrictions as discussed in more detail below, because they are operationally effective and reduce serious injuries and mortalities of right whales, as required under § 229.32(g)(2)(i). The determination to allow for limited exemptions in the area south of 29°00' N. lat. during the restricted period is based on several factors, including right whale distribution patterns in this area and time, existing state gillnet prohibitions, and gear characteristics and operational methods used in the deployment of these two fisheries. Regarding right whale distribution patterns, aerial survey data and habitat modeling analyses indicate that right whales are distributed closer to shore (and predominantly in state waters) when they are south of 29°00' N. lat. than when they are north of 29°00' N. lat. during the restricted period. Current regulations prohibiting gillnets in Florida state waters provide additional protection for right whales when they are closer to shore (i.e., when they are in waters south of 29°00' N. lat.). As discussed in more detail below, the proposed exempted gillnet operations, with the combination of existing and new regulatory requirements on the type of gear that can be used in this area and during the restricted period, are both operationally effective and capable of protecting right whales from the risk of

serious injury and mortality of right whales, pursuant to § 229.32(g)(2)(i).

This approach of prohibiting gillnet fishing in the southeast U.S. restricted area south of 29°00' N. lat. during the restricted period, while allowing for limited exemptions for specific known fishing operations considered by NMFS and determined to have a negligible risk to right whales, is consistent with § 229.32(g)(1) and (2), and effectively eliminates the risk of any new gillnet fishing operation from emerging in this area during this period without first considering the risk that particular operation poses to right whales and whether that operation meets the conditions for an exemption in § 229.32(g)(2).

*Exemption for the Strikenet Component of the Southeastern U.S. Atlantic Shark Gillnet Fishery*

NMFS considered if gear characteristics of the strikenet component of the Southeastern U.S. Atlantic shark gillnet fishery, as currently specified under the ALWTRP regulations at § 229.32 and under the shark regulations at part 635 of this title, were both operationally effective and capable of protecting right whales from the risk of reducing serious injury and mortality in the area south of 29°00' N. lat. during the restricted period, pursuant to § 229.32(g)(2)(i).

The ALWTRP's recommendations and NMFS' management approach for the shark gillnet fishery under the original ALWTRP implemented in 1997 was to minimize the overlap between this fishery and right whale distribution in the Southeast (62 FR 39157, July 22, 1997). At the time of enactment of the ALWTRP, fishermen fishing for sharks with gillnets used large mesh gillnets of 5 inches or greater stretch mesh. To reduce potential take of right whales incidental to shark gillnetting activity, fishing with gillnets of 5 inches stretched mesh or greater was prohibited in the southeast U.S. restricted area during the restricted period, unless used as strikenets in accordance with § 229.32(f)(4)(iv). Fishing for sharks with strikenets generally uses less gillnet and shorter soak times than traditional shark gillnets that are deployed in straight sets. Furthermore, the ALWTRP requires that nets not be set, or must be removed, if endangered whales are within 3 nautical miles (5.6 km) of deployed gear, that no nets are set at night or in low visibility, and that sets be made under the observation of spotter planes (§ 229.32(f)(4)(iv)). With these restrictions in place, fishing for shark with strikenets was considered to

present an acceptable level of risk to endangered whales.

Discussions at the SE Subgroup meeting suggest this approach of prohibiting shark gillnetting in the southeast U.S. restricted area during the restricted period under the ALWTRP, while exempting strikenetting for sharks in accordance with § 229.32(f)(iv), has been largely successful at protecting right whales from the risk of serious injury and mortality, and that the strikenet component of the Southeastern U.S. Atlantic shark gillnet fishery should continue to be allowed as an exemption to the prohibitions on gillnetting under the ALWTRP during the restricted period, but only in the area south of 29°00' N. lat. However, at the SE Subgroup meeting, NMFS learned that, consistent with the ALWTRP regulations, gillnet fishermen would not set strikenets after sunset, but that occasionally nets were not completely removed from the water until after sunset. NMFS believes the intent of the original restriction in the ALWTRP regulations at § 229.32(f)(4)(iv) to prohibit setting at night was to eliminate the possibility of endangered whales moving undetected within close proximity of deployed gillnets during periods of low visibility. Consequently, NMFS is proposing, as an additional condition of this exemption, an amendment to the existing regulations at § 229.32(f)(4)(iv) that would specifically require all nets to be removed from the water before night or immediately if visibility decreases below 500 yards (460 m).

NMFS is also proposing that only fishermen that have a valid commercial directed shark limited access permit be exempted from the gillnet prohibition, so that fishing effort is limited to ensure that no one tries to fish in this area without following the other regulations applicable to the shark gillnet fishery at § 229.32(f)(4)(iv).

NMFS has determined that the combination of: existing gear requirements at § 229.32(f)(4)(iv), the proposed new requirements for fishermen to have a valid commercial directed shark limited access permit, the proposed new restrictions on strikenets in the water at night and during times of low visibility, known and predicted right whale distribution patterns in the southeast U.S. restricted area south of 29°00' N. lat. during the restricted period, and existing Florida regulations prohibiting gillnets in state waters, are operationally effective and will protect right whales from the risk of serious injury or mortality in the southeast U.S. restricted area south of 29°00' N. lat. during the restricted period, thereby

warranting an exemption, pursuant to § 299.32(g)(2)(i), to allow the use of strikenets to fish for sharks during this time and in this area. This determination is consistent with the consensus recommendation of the SE Subgroup and the MMC's recommendation.

*Exemption for the Spanish Mackerel Component of the Southeast Atlantic Gillnet Fishery*

NMFS considered if gear characteristics of the Spanish mackerel component of the Southeast Atlantic gillnet fishery were both operationally effective and capable of protecting right whales from the risk of serious injury and mortality in the area south of 29°00' N. lat., pursuant to § 229.32(g)(2)(i). As noted previously, the Spanish mackerel component of the Southeast Atlantic gillnet fishery is the only directed gillnet fishery that currently operates in the southeast U.S. restricted area south of 29°00' N. lat. during the restricted period.

The SE Subgroup discussed the characteristics and deployment methods of gillnet fishing for Spanish mackerel to determine whether this fishing operation warranted an exemption under § 229.32(g)(2) from the recommended prohibition on gillnets in the southeast restricted area south of 29°00' N. lat. during the restricted period. Members noted that right whales were found in cooler water temperatures than Spanish mackerel and that the two species may separate themselves seasonally for this reason. Furthermore, gillnet fishing for Spanish mackerel is already regulated under fishery management plan regulations in a way that greatly limits soak time and the amount of gear that can be used, thereby reducing the potential for interactions with large whales. Specifically, regulations for Spanish mackerel gillnet fishing at § 622.41(c)(3)(ii) of this title include restricting the soak period to no more than one hour, allowing only one gillnet to be fished, set or placed in the water at any one time, and restricting the float line to no longer than 800 yards (732 m). The SE Subgroup recommended that an exemption be provided to allow gillnet fishing for Spanish mackerel in the southeast U.S. restricted area south of 29°00' N. lat. during December and March (when Spanish mackerel are likely in the southeast U.S. restricted area but south of 29°00' N. lat.), provided: (1) the Spanish mackerel-related regulatory provisions in 50 CFR part 622 are amended to the ALWTRP, (2) fishing at night is prohibited, (3) nets are not set if endangered whales are within 3

nautical miles (5.6 km), and (4) nets are removed from the water if an endangered whale moves within 3 nautical miles (5.6 km) of the gear.

NMFS agrees with the SE Subgroup and MMC that gillnet gear characteristics when fishing for Spanish mackerel in accordance with provisions in the SE Subgroup's recommended measures represents a negligible risk to right whales. Specifically, NMFS has determined that the combination of: existing gear requirements for Spanish mackerel gillnets at § 622.41 (c)(3)(ii) of this title, new gear requirements prohibiting the setting of gear at night or in low visibility and requiring nets not to be set and to be removed from the water if endangered whales are within 3 nautical miles, known and predicted right whale distribution patterns in the southeast U.S. restricted area south of 29°00' N. lat. during December and March, and existing Florida regulations prohibiting gillnets in state waters, are operationally effective and will protect right whales from the risk of serious injury or mortality in the southeast U.S. restricted area south of 29°00' N. lat. from December 1–31 and from March 1–31, thereby warranting an exemption, pursuant to § 229.32(g)(2)(I) of this title, to allow the use of gillnets to fish for Spanish mackerel during this time and in this area.

Humpback and fin whales are not known to occur in Southeast U.S. waters as frequently as right whales; however, by including humpback and fin whales, in addition to right whales, within the provisions would provide important protection to right whales in the event a gillnet fishermen mistakenly identifies a right whale as a humpback or fin whale and fails to remove gear from the water. Providing this protection to humpback and fin whales is also an appropriate amendment of the ALWTRP regulations because it satisfies the MMPA's standards that such regulations reduce incidental mortality and serious injury of marine mammals taken in the course of commercial fishing covered by the plan to insignificant levels approaching a zero rate.

NMFS also considered the characteristics of gillnet fishing for whiting. However, as noted above, fishing effort targeting whiting has only occurred north of 29°00' N. lat. to date (landings south of 29°00' N. lat. have been bycatch), and there was no indication from fishermen at the SE Subgroup meeting that fishing for whiting would be pursued south of 29°00' N. lat. Therefore, until such time that there is a need to consider an exemption for whiting or any other component of the Southeast Atlantic

gillnet fishery, the only component of the Southeast Atlantic gillnet fishery proposed for exemption from the gillnet prohibition south of 29°00' N. lat. is Spanish mackerel.

*Transits with Gillnet in the Proposed Expanded Southeast U.S. Restricted Area North of 29°00' N. lat. During the New Proposed Restricted Period*

NMFS considered the difficulties for law enforcement in sometimes discerning between vessels with gillnet onboard that are merely transiting through a closed area versus vessels with gillnet onboard that may be engaged in illegal fishing in a closed area. Therefore, NMFS is proposing to prohibit possession of gillnet in the expanded Southeast U.S. Restricted Area north of 29°00' N. lat., where no exemptions to the gillnet prohibitions are proposed during the restricted period. Gillnet vessels that typically fish in the southeast U.S. restricted area are rather small, and gillnet fishermen typically only make short-range, single-day trips when they are fishing and would have fish on board. NMFS believes that gillnet fishermen would not be transporting fish over long distances (i.e., through the southeast U.S. restricted area north of 29°00' N. lat.) since these smaller fishing vessels generally do not have the capacity to hold and preserve fish while transiting safely over this large distance (i.e., between North Carolina and Cape Canaveral, FL). However, NMFS considered that some gillnet fishermen may need to transit through this portion of the expanded Southeast U.S. Restricted Area en route to fishing grounds on either side of that area. Consequently, NMFS is also proposing providing an exemption for vessels that are transiting through the expanded Southeast U.S. Restricted Area north of 29°00' N. lat. from the prohibition of possessing a gillnet, if gear is stowed in accordance with this rule.

*Observer Call-in Requirement*

Present ALWTRP regulations state that no person may fish with shark gillnet gear in the southeast U.S. observer area during the restricted period unless that person calls the NMFS Southeast Regional Office in St. Petersburg, FL not less than 48 hours prior to departing on any fishing trip. However, the NMFS Southeast Fisheries Science Center Laboratory in Panama City, FL is responsible for arranging observer coverage. NMFS believes that this discrepancy may result in confusion and is, consequently, proposing changing the call-in requirement from the Southeast

Regional Office in St. Petersburg to the Panama City Laboratory.

#### *Endangered Species Act as an Authority*

NMFS is responsible for ensuring that takings of endangered right whales by commercial fishing activities do not violate the ESA as well as the MMPA. Consequently, NMFS is promulgating the proposed amendments and revisions to § 229.32(f) under the MMPA and under section 11(f) of the ESA, which authorizes regulations appropriate to enforce the ESA including to prevent unauthorized takings.

#### **Proposed Management Measures for Gillnetting Activity in the Southeast U.S. Restricted Area**

This section summarizes the modifications that NMFS is proposing to the ALWTRP in the Southeast U.S. through this proposed rule. The proposed restrictions are in accordance with requirements of § 229.32(g)(1) and (g)(2).

NMFS proposes to expand the southeast U.S. restricted area to include waters off South Carolina, within 35 nautical miles (64.8 km) of shore. NMFS is also specifically soliciting comments on the appropriateness of extending the Restricted Area to 40 nautical miles (74.1 km) offshore of South Carolina, as recommended by the MMC in its May 2006 letter to NMFS. NMFS is proposing to divide, at 29°00' N. lat., the Southeast U.S. Restricted Area into Southeast U.S. Restricted Areas N and S, and to amend the restricted period for the two areas to be from November 15 through April 15 and December 1 through March 31, respectively. However, NMFS is also specifically soliciting comments on the appropriateness of a restricted period of November 1 through April 30 for the Southeast U.S. Restricted Area N. Figure 1 illustrates the proposed restricted area and restricted periods. NMFS notes that the June 21, 2005, proposed rule (70 FR 35894) also proposed to divide the restricted area and amend the restricted periods in the same manner as proposed in this rulemaking. Thus, unless changed in response to public comment, these provisions will be implemented in the first of these rules to be finalized.

NMFS is proposing that, during restricted periods, fishing with or

possessing gillnet in the Southeast U.S. Restricted Area N be prohibited and fishing with gillnet in the Southeast U.S. Restricted Area S be prohibited. Special exemptions for the Southeast U.S. Restricted Area S would apply as follows: (1) strikenet component of the Southeastern U.S. Atlantic shark gillnet fishery - Fishing for sharks with gillnet with a 5-inch (12.7-cm) or greater stretch mesh size in the Southeast U.S. Restricted Area S is exempt from the restrictions during the restricted period if: (a) gillnet is deployed so that it encloses an area of water, (b) a valid commercial directed shark limited access permit has been issued to the vessel in accordance with § 635.4(e) of this title and is on board; (c) no net is set or remains in the water at night or when visibility is less than 500 yards (460 m), (d) each set is made under the observation of a spotter plane, (e) no gillnet is set within 3 nautical miles (5.6 km) of a right, humpback, or fin whale, and (f) gillnet is removed immediately from the water if a right, humpback, or fin whale moves within 3 nautical miles (5.6 km) of the set gear. (2) Spanish mackerel component of the Southeast Atlantic gillnet fishery - Fishing with gillnet for Spanish mackerel in the Southeast U.S. Restricted Area S is exempt from the restrictions during the periods December 1 through December 31, and March 1 through March 31, if: (a) gillnet mesh size is between 3.5 inches (8.9 cm) and 4.9 inches (12.4 cm) stretched mesh, (b) a valid commercial vessel permit for Spanish mackerel has been issued to the vessel and is on board, (c) no person may fish with, set, place in the water, or have on board a gillnet with a float line longer than 800 yd (732 m), (d) no person may fish with, set, or place in the water more than one gillnet at any time, (e) no more than two gillnets, including any net in use, may be possessed at any one time; provided, however, that if two gillnets, including any net in use, are possessed at any one time, they must have stretched mesh sizes (as allowed under the regulations) that differ by at least 0.25 inch (0.64 cm), (f) no person may soak a gillnet for more than 1 hour, (g) no net is set or remains in the water at night or when visibility is less than 500 yards (460 m), (h) no net is set within 3 nautical miles

(5.6 km) of a right, humpback, or fin whale, (i) gillnet is removed immediately from the water if a right, humpback, or fin whale moves within 3 nautical miles (5.6 km) of the set gear, and (j) gillnet must be removed from the water before night or immediately if visibility decreases below 500 yards (460 m).

#### *Exemptions for Transiting through the Proposed Expanded Southeast U.S. Restricted Area North of 29°00' N. lat. During the New Proposed Restricted Period*

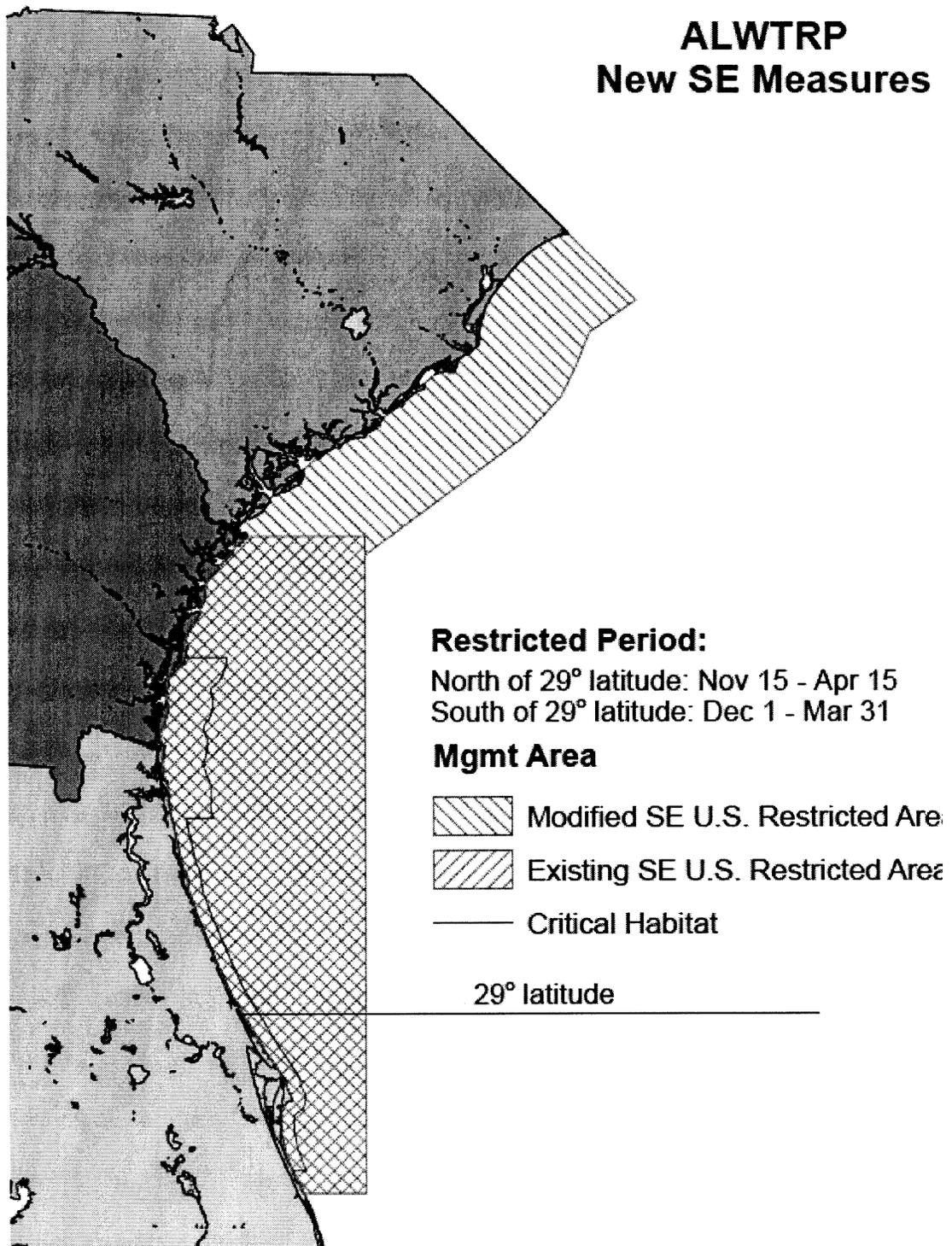
Vessels with gillnet onboard may transit through the Southeast U.S. Restricted Area north of 29°00' N. lat. during the Restricted Period if: All nets are covered with canvas or other similar material and lashed or otherwise securely fastened to the deck, rail, or drum; and all buoys, high flyers, and anchors are disconnected from all gillnets. No fish may be possessed aboard such a vessel in transit.

#### *Definitions*

NMFS is proposing to remove the definitions for "Shark gillnetting," "Strikenet or to fish with strike gillnet gear," and "to strikenet for sharks" from the regulations at § 229.2. NMFS' proposed regulatory language more effectively addresses these definitions by including them where they are used in § 229.32(f). Similarly, NMFS is proposing to modify language at § 229.32(g)(1) to be consistent with the modifications of the restricted areas contained in this proposed rule.

#### *Other Changes to the ALWTRP*

NMFS is proposing to revise the notification requirements for fishermen fishing for shark with gillnet in the southeast U.S. observer area to clarify that the Southeast Fisheries Science Center Panama City Laboratory, and not the Southeast Regional Office, should be notified prior to fishing. NMFS is also proposing to extend the period that fishermen are required to notify the Panama City Laboratory to November 15 to April 15 north of 29°00' N. lat. and modify the period from December 1 to March 31 south of 29°00' N. lat. to be consistent with the proposed change in the restricted period at § 229.32(f)(4)(i).



**Figure 1.** Proposed and existing Southeast U.S. Restricted Area and Proposed Restricted Periods.

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### Classification

In accordance with section 118(f)(9) of the MMPA, NMFS 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, NMFS is promulgating these 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.

NMFS determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of Florida, Georgia, and South Carolina. This determination has been submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act.

This proposed rule has been determined not to be significant under Executive Order (E.O.) 12866.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). 5 U.S.C. 601 *et seq.* The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble of this proposed rule. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

In summary, the purpose for this proposed rule is to implement the requirements of § 229.32(g)(1) and to reduce serious injury and mortality to North Atlantic right whales incidental to commercial gillnet fishing in the Southeast U.S. Atlantic Ocean, in response to the death of a right whale calf in January 2006. The implemented provisions would include expanding the Southeast U.S. Restricted area, with certain exemptions. The Marine Mammal Protection Act and the Endangered Species Act provide the statutory bases for the proposed rule.

No duplicative, overlapping, or conflicting Federal rules have been identified. No new reporting or recordkeeping requirements are associated with the proposed rule.

Commercial fishing vessels that operate in the proposed expanded southeast U.S. restricted area from November 15 through April 15 (waters off South Carolina, Georgia, and northeast Florida) and use gillnets would be affected by this rule. This rule is expected to have greatest impact on gillnet fishermen targeting whiting, shark and Spanish mackerel. Six to eight shark gillnet fishing vessels and up to 56 finfish gillnet fishing vessels, will be affected by this rule. The Small Business Administration defines a small entity in the commercial fishing sector as a firm that is independently owned and operated, is not dominant in its field of operation, and has average annual gross receipts not in excess of \$4 million (2002 NAICS 11411). It is

assumed that all of the affected vessels represent small businesses. All of the vessels that are engaged in shark and finfish gillnet fishing in the proposed expanded southeast U.S. restricted area are small businesses. This proposed rule would affect all of those businesses. Consequently, it will affect a substantial number of small businesses.

The proposed action would prohibit gillnet fishing in a northern zone of the proposed expanded restricted area, during the restricted period, without exemptions. The proposed action would reduce average annual shark gillnet revenue in the northern zone by \$4,029. Total shark gillnet landings in Florida north of 29°00' N lat. from November 1 through April 30 varied from zero to 38,229 lbs during the years from 2000 through 2004, with an annual average of 12,768 lbs (5,804 kg) and a dockside value of \$7,712. These averages represent an over-estimation of losses from reduced shark gillnet landings in Florida from the northern zone because the restricted period is actually from November 15 through April 15, not November 1 through April 30. If November landings during the restricted period represent 50 percent of all November landings, and if April landings during the restricted period represent 50 percent of all April landings, the proposed action would reduce total shark gillnet landings in Florida from the northern zone by \$3,856 and 6,384 lbs (2,902 kg). The proposed action would reduce average annual shark gillnet landings by 6,636 lbs (3,016 kg) and average annual shark gillnet revenue in the northern zone (South Carolina and Florida combined) by \$4,029 (\$3,856 from Florida plus \$173 from South Carolina), assuming not all November and April landings occur in the restricted period.

The proposed action would prohibit gillnet fishing during the restricted period in a southern zone of the proposed expanded restricted area with certain limited exemptions for shark and Spanish mackerel gillnet fishing. The southern zone is composed of Trip Ticket area 732, which lies entirely in Florida waters. This rule would have no effect on shark gillnet revenues in the southern zone because current shark gillnet operations in the southern zone are substantially the same as the requirements for the exemptions proposed in this action.

The average annual shark gillnet revenue lost as a result of this proposed rule is \$4,029 (\$4,029 from the northern zone plus \$0 from the southern zone), which represents about 2 percent of annual shark gillnet revenues from the combined zones. As six to eight shark

gillnet fishing vessels would be affected by this proposed rule, each shark gillnet fishing vessel would lose on average from \$504 to \$672 annually from lost shark landings.

It is estimated that Spanish mackerel gillnet fishermen in the northern zone would lose on average 1,509 lbs (686 kg) of Spanish mackerel with an average dockside value of \$1,159 annually. During the 6-month period from November 1 through April 30 from 2000 through 2004, an average of 102 lbs (46 kg) of Spanish mackerel with a dockside value of \$86 were landed from gillnets and caught in the northern zone. In the first four months of 2005, however, 1,509 lbs (686 kg) with a dockside value of \$1,159 were landed from gillnets. It is possible that, since 2005, Spanish mackerel fishers are increasingly targeting the species in the northern zone during these 5 months. Consequently, November through December 2004 and January through April 2005 landings of Spanish mackerel were used to estimate losses of gillnet landings to Spanish mackerel fishers in the northern zone, although this method may significantly overestimate losses to Spanish mackerel gillnet fishers who operate in the northern zone. These northern zone landings represent less than half a percent of annual Spanish mackerel landings in the southeast U.S. restricted area.

Annual losses to Spanish mackerel gillnet fishers in the southern zone would be \$2,928 on average. Spanish mackerel gillnet fishers will not be able to take the species in the southern zone during the months of January and February. From 2000 through 2004, landings during these 2 months averaged 5,442 lbs (2,474 kg), with a dockside value of \$2,928, annually. This analysis assumes Spanish mackerel gillnet fishers will not experience any losses of landings during the other months of the restricted period because exemptions to this alternative are consistent with existing Spanish mackerel gillnet operations during these other months. Consequently, annual losses to Spanish mackerel gillnet fishers in the southern zone would be \$2,928 (5,442 lbs; 2,474 kg). These southern zone landings represent about 1.5 percent of annual Spanish mackerel gillnet landings in the southeast U.S. restricted area.

The combined loss of landings from the northern and southern zones of Spanish mackerel would be 6,951 lbs (3,160 kg; \$4,087). This combined loss represents approximately 2 percent of lbs annually landed in the southeast U.S. restricted area.

Average annual losses of king whiting from the northern zone would be 356,604 lbs (162,093 kg) with a dockside value of \$276,824. Average annual landings of king whiting during the 5-month period between November through April from 2000 through 2004 vary significantly from landings during the first 4 months of 2005. Consequently, November and December 2004 figures and the January through April 2005 figures are used to estimate average annual losses of gillnet landings of king whiting from the northern zone. If all November and April landings occur within the restricted period, average annual losses of king whiting landings in the northern zone would be 419,418 lbs with a value of \$327,053. However, if November and April landings are evenly distributed throughout those months, estimated loss of landings during the restricted period would represent 50 percent of November and April landings, respectively (since the restricted period begins November 15 and ends April 15), average annual losses of king whiting from the northern zone would be 356,604 lbs (162,093 kg) with a dockside value of \$276,824.

Average annual losses of king whiting landings from the southern zone would be 4,255 lbs (1,934 kg) with a dockside value of \$4,318. During the above 4-month period from 2000 through 2004, an average of 4,255 lbs (1,934 kg) of king whiting were landed in the southern zone with a dockside value of \$4,318, annually. Figures from January 1 through March 31, 2005, do not suggest that king whiting gillnet fishers are increasingly targeting the species in the southern zone.

The combined loss of king whiting landings from the northern and southern zones would be 360,859 lbs (164,027 kg; \$281,142). The combined loss represents at least 70 percent of lbs landed annually in the southeast U.S. restricted area.

Three other alternative operational measures were considered in this proposed rulemaking. Alternative 1 was a no-action alternative, rejected because it would not address the risk of serious injury or mortality posed by commercial gillnet fishing to right whales in their calving area evidenced by the 2006 death of a right whale calf.

Alternative 2 would implement permanent limited operational restrictions in the expanded southeast U.S. restricted area during the current restricted period of November 15 through March 31, annually. The enactment of operational restrictions, as detailed in section 2.2.2 of the EA, would provide a reduction in the

likelihood of gillnet gear interactions with endangered right whales, reducing the risk of serious injury and mortality. This alternative would also result in a reduction in the risk of injury or mortality to other species that may become incidentally entangled in gillnet gear. However, the restrictions would only reduce and not eliminate the threat of serious injury and mortality of right whales from gillnet.

Alternative 3 would implement the immediate closure of the expanded southeast U.S. restricted area to all gillnets from November 15 through March 31 annually on a permanent basis. No exemptions would be provided during the closure. Losses of gillnet landings caused by Alternative 3 would be equal to losses of gillnet landings caused by Alternative 2 plus losses of king whiting gillnet landings. Alternative 2 would reduce gillnet dockside revenues by \$84,506 (\$16,944, \$50,447, \$642, \$4,742, and \$11,731 from reduced landings of shark, Spanish mackerel, King mackerel, Bluefish, and "Other Species", respectively). Average annual losses to king whiting fishers caused by Alternative 3 would be 348,301 lbs (158,319 kg), with dockside revenues of \$271,696. Combined, Alternative 3 would result in losses of dockside revenue of \$356,202.

NMFS does not believe the proposed action contains policies with federalism implications under E.O. 13132. However, the Assistant Secretary for Legislative and Intergovernmental Affairs will provide notice of the proposed action and request for comments to the appropriate official(s) of the states adjacent to the proposed expanded Southeast U.S. Restricted Area.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act (PRA). Any information collection requirements subject to PRA and related to VMS or observer requirements were addressed in previous rulemakings.

#### List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: November 8, 2006.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For reasons set out in the preamble, 50 CFR part 229 is proposed to be amended as follows:

**PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972**

1. The authority citation for part 229 is revised to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*; § 229.32(f) also issued under 16 U.S.C. 1531 *et seq.*

2. In § 229.2, the definitions of “*Shark gillnetting*,” “*Strikenet or to fish with strikenet gear*,” and “*To strikenet for sharks*” are removed.

3. In § 229.32, paragraphs (f)(1)(i), (f)(3), (f)(4), and (g)(1) are revised to read as follows:

**§ 229.32 Atlantic large whale take reduction plan regulations.**

\* \* \* \* \*

(f) \* \* \*

(1) \* \* \*

(i) *Southeast U.S. Restricted Area.*

The Southeast U.S. Restricted Area consists of the area bounded by straight lines connecting the following points in the order stated from south to north, unless the Assistant Administrator changes that area in accordance with paragraph (g) of this section:

Point	N. Lat.	W. Long.
SERA1	27°51'	(1)
SERA2	27°51'	80°00'
SERA3	32°00'	80°00'
SERA4	32°36'	78°52'
SERA5	32°51'	78°36'
SERA6	33°15'	78°24'
SERA7	33°27'	78°04'
SERA8	(2)	(2)

<sup>1</sup>Florida shoreline.

<sup>2</sup>Shoreline at South Carolina/North Carolina state border.

(A) *Southeast U.S. Restricted N.* The Southeast U.S. Restricted Area N consists of the Southeast U.S. Restricted Area from 29°00' N. lat. northward.

(B) *Southeast U.S. Restricted Area S.* The Southeast U.S. Restricted Area S consists of the Southeast U.S. Restricted Area southward of 29°00' N. lat.

\* \* \* \* \*

(3) *Observer requirement.* No person may fish with gillnet with webbing of 5 inches (12.7 cm) or greater stretched mesh in the southeast U.S. observer area from November 15 through April 15 of the following year north of 29°00' N. lat. and from December 1 to March 31 of the following year south of 29°00' N. lat. unless the operator of the vessel calls the Southeast Fisheries Science Center Panama City Laboratory in Panama City, FL, not less than 48 hours prior to departing on any fishing trip in order to arrange for observer coverage. If the Panama City Laboratory requests that an

observer be taken on board a vessel during a fishing trip at any time from November 15 through April 15 of the following year north of 29°00' N. lat. and from December 1 to March 31 of the following year south of 29°00' N. lat., no person may fish with such gillnet aboard that vessel in the southeast U.S. observer area unless an observer is on board that vessel during the trip.

(4) *Restricted periods, closure, and exemptions.*

(i) *Restricted periods.* The restricted period for the Southeast U.S. Restricted Area N is from November 15 through April 15, and the restricted period for the Southeast U.S. Restricted Area S is from December 1 through March 31, unless the Assistant Administrator revises the restricted period in accordance with paragraph (g) of this section.

(ii) *Closure for gillnets.*

(A) Except as provided under paragraph (f)(4)(v) of this section, fishing with or possessing gillnet in the southeast U.S. restricted area N during the restricted period is prohibited.

(B) Except as provided under paragraph (f)(4)(iii) of this section and (f)(4)(iv) of this section, fishing with gillnet in the southeast U.S. restricted area S during the restricted period is prohibited.

(iii) *Exemption for Southeastern U.S. Atlantic shark gillnet fishery.* Fishing with gillnet for sharks with webbing of 5 inches (12.7 cm) or greater stretched mesh is exempt from the restrictions under paragraph (f)(4)(ii)(B) of this section if:

(A) The gillnet is deployed so that it encloses an area of water;

(B) A valid commercial directed shark limited access permit has been issued to the vessel in accordance with § 635.4(e) and is on board;

(C) No net is set at night or when visibility is less than 500 yards (460 m);

(D) The gillnet is removed from the water before night or immediately if visibility decreases below 500 yards (460 m);

(E) Each set is made under the observation of a spotter plane;

(F) No gillnet is set within 3 nautical miles (5.6 km) of a right, humpback, or fin whale; and

(G) The gillnet is removed immediately from the water if a right, humpback, or fin whale moves within 3 nautical miles (5.6 km) of the set gear.

(iv) *Exemption for Southeast Atlantic gillnet fishery.* Fishing with gillnet for Spanish mackerel is exempt from the restrictions under paragraph (f)(4)(ii)(B) of this section from December 1 to December 31, and from March 1 to March 31 if:

(A) Gillnet mesh size is between 3.5 inches (8.9 cm) and 4 7/8 inches (12.4 cm) stretched mesh;

(B) A valid commercial vessel permit for Spanish mackerel has been issued to the vessel in accordance with § 622.4(a)(2)(iv) and is on board;

(C) No person may fish with, set, place in the water, or have on board a gillnet with a float line longer than 800 yd (732 m);

(D) No person may fish with, set, or place in the water more than one gillnet at any time;

(E) No more than two gillnets, including any net in use, may be possessed at any one time; provided, however, that if two gillnets, including any net in use, are possessed at any one time, they must have stretched mesh sizes (as allowed under the regulations) that differ by at least .25 inch (.64 cm);

(F) No person may soak a gillnet for more than 1 hour. The soak period begins when the first mesh is placed in the water and ends either when the first mesh is retrieved back on board the vessel or the gathering of the gillnet is begun to facilitate retrieval on board the vessel, whichever occurs first; providing that, once the first mesh is retrieved or the gathering is begun, the retrieval is continuous until the gillnet is completely removed from the water;

(G) No net is set at night or when visibility is less than 500 yards (1,500 ft, 460 m);

(H) The gillnet is removed from the water before night or immediately if visibility decreases below 500 yards (1,500 ft, 460 m);

(I) No net is set within 3 nautical miles (5.6 km) of a right, humpback, or fin whale; and

(J) Gillnet is removed immediately from the water if a right, humpback, or fin whale moves within 3 nautical miles (5.6 km) of the set gear.

(v) *Exemption for vessels in transit with gillnet aboard.* Possession of gillnet aboard a vessel in transit is exempt from the restrictions under paragraph (f)(4)(ii)(A) of this section if: All nets are covered with canvas or other similar material and lashed or otherwise securely fastened to the deck, rail, or drum; and all buoys, high flyers, and anchors are disconnected from all gillnets. No fish may be possessed aboard such a vessel in transit.

(g) \* \* \*

(1) *Entanglements in critical habitat or restricted areas.* If a serious injury or mortality of a right whale occurs in the Cape Cod Bay critical habitat from January 1 through May 15, the Great South Channel Restricted Area from April 1 through June 30, the Southeast U.S. Restricted Area N from November

15 through April 15, or the Southeast U.S. Restricted Area S from December 1 through March 31 as the result of an entanglement by lobster or gillnet gear allowed to be used in those areas and times, the Assistant Administrator shall

close that area to that gear type (i.e., lobster trap or gillnet) for the rest of that time period and for that same time period in each subsequent year, unless the Assistant Administrator revises the restricted period in accordance with

paragraph (g)(2) of this section or unless other measures are implemented under paragraph (g)(2) of this section.

\* \* \* \* \*

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