

Executive Order because this special rule will, with limited exceptions, maintain the status quo regarding activities currently allowed under the MMPA. A takings implication assessment is not required.

#### Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. This rule will not have substantial direct effects on the State, on the relationship between the Federal Government and the State, or on the distribution of power and responsibilities among the various levels of government.

#### Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

#### Paperwork Reduction Act

This special rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* The rule does not impose new record keeping or reporting requirements on State or local governments, individuals, and businesses, or organizations. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### National Environmental Policy Act (NEPA)

This rule is exempt from NEPA procedures. In 1983, upon recommendation of the Council on Environmental Quality, the Service determined that NEPA documents need not be prepared in connection with regulations adopted pursuant to section 4(a) of the ESA. The Service subsequently expanded this determination to section 4(d) rules. A section 4(d) rule provides the appropriate and necessary prohibitions and authorizations for a species that has been determined to be threatened under section 4(a) of the ESA. NEPA procedures would confuse matters by overlaying its own matrix upon the section 4 decision-making process. The opportunity for public comment—one of the goals of NEPA—is also already provided through section 4 rulemaking procedures. This determination was upheld in *Center for Biological Diversity*

*v. U.S. Fish and Wildlife Service*, No. 04–04324 (N.D. Cal. 2005).

#### Government-to-Government Relationship With Tribes

The Service, in accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175 and the Department of the Interior's manual at 512 DM 2, and Secretarial Order 3225, acknowledges our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. During the public comment period following our proposal to list the polar bear as threatened (72 FR 1064), Alaska Native tribes and tribally authorized organizations were among those that provided comments on the listing action. In addition, public hearings were held at Anchorage (March 1, 2007) and Barrow (March 7, 2007), Alaska. For the Barrow public hearing, we established teleconferencing capabilities to provide an opportunity to receive testimony from outlying communities. The communities of Kaktovik, Gambell, Kotzebue, Shishmaref, and Point Lay, Alaska, participated in this public hearing via teleconference.

#### Energy Supply, Distribution or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. For reasons discussed within this rule, we believe that the rule does not have any effect on energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

#### List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

#### Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

#### PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.40 by revising paragraph (q) to read as follows:

#### § 17.40 Special rules—mammals.

\* \* \* \* \*

(q) Polar bear (*Ursus maritimus*).

(1) Except as noted in paragraphs (q)(2) and (q)(4) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 of this part apply to the polar bear.

(2) None of the prohibitions in § 17.31 of this part apply to any activity that is authorized or exempted under the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 *et seq.*, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), or both, provided that the person carrying out the activity has complied with all terms and conditions that apply to that activity under the provisions of the MMPA and CITES and their implementing regulations.

(3) All applicable provisions of 50 CFR parts 14, 18, and 23 must be met.

(4) None of the prohibitions in § 17.31 of this part apply to any taking of polar bears that is incidental to, but not the purpose of, carrying out an otherwise lawful activity within the United States, except for any incidental taking caused by activities in areas subject to the jurisdiction or sovereign rights of the United States within the current range of the polar bear.

Dated: December 10, 2008.

**Lyle Laverty,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E8–29675 Filed 12–15–08; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 0812101578–81580–01]

RIN 0648–XM23

#### 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:** Temporary rule.

**SUMMARY:** The Assistant Administrator for Fisheries (AA), NOAA, announces

temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen for 15 days in an area east of Portsmouth, New Hampshire ranging from 1,284 nm<sup>2</sup> to 1,354 nm<sup>2</sup> (4,404 km<sup>2</sup> to 4,644.1 km<sup>2</sup>), depending on the temporal and spatial overlap with another previously established DAM zone. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

**DATES:** Effective beginning at 0001 hours December 18, 2008, through 2400 hours January 2, 2009.

**ADDRESSES:** Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Diane Borggaard, NMFS/Northeast Region, 978-281-9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301-713-2322.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at <http://www.nero.noaa.gov/whaletrp/>.

**Background**

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the

ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in order to protect right whales and is applicable to areas north of 42° 30' N. lat. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15-day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15-day period and asking fishermen not to set any additional gear in the DAM zone during the 15-day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm<sup>2</sup> (139 km<sup>2</sup>)) such that right whale density is equal to or greater than 0.04 right whales per nm<sup>2</sup> (1.85 km<sup>2</sup>). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On December 6, 2008, an aerial survey reported an aggregation of 3 right whales in the general proximity of 42° 56' N. latitude and 69° 13' W. longitude. The position lies approximately 70nm east of Portsmouth, New Hampshire, in proximity to Cashes Ledge. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors,

including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15-day restricted period unless it is modified in the manner described in this temporary rule.

This DAM zone overlaps with one other DAM zone that published in the **Federal Register** on December 12, 2008, and is in effect from 0001 hours December 14, 2008 through 2400 hours December 28, 2008. Effective from 0001 hours December 18, 2008, through 2400 hours December 28, 2008, the DAM zone is bounded by the following coordinates when it overlaps the previously established DAM zone:

43° 16' N., 69° 39' W. (NW Corner)  
43° 16' N., 68° 57' W.  
43° 04' N., 68° 57' W.  
43° 04' N., 68° 49' W.  
42° 39' N., 68° 49' W.  
42° 39' N., 69° 39' W.  
43° 16' N., 69° 39' W. (NW Corner)  
Effective from 0001 hours December 29, 2008, through 2400 hours January 2, 2009, the DAM zone is bounded by the following coordinates:  
43° 16' N., 69° 39' W. (NW Corner)  
43° 16' N., 68° 57' W.  
43° 04' N., 68° 57' W.  
43° 04' N., 68° 49' W.  
42° 39' N., 68° 49' W.  
42° 39' N., 69° 39' W.  
43° 16' N., 69° 39' W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone.

**Lobster trap/pot gear**

Fishermen utilizing lobster trap/pot gear within portions of Northern Nearshore Lobster Waters that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

#### **Anchored Gillnet Gear**

Fishermen utilizing anchored gillnet gear within the portions of the Other Northeast Gillnet Waters Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per string;

4. The breaking strength of each net panel weak link must not exceed 1,100 lb (498.8 kg). The weak link requirements apply to all variations in net panel size. One weak link must be placed in the center of the floatline and one weak link must be placed in the center of each of the up and down lines at both ends of the net panel. Additionally, one weak link must be placed as close as possible to each end of the net panels on the floatline; or, one weak link must be placed between floatline tie-loops between net panels and one weak link must be placed where the floatline tie-loops attach to the bridle, buoy line, or groundline at each end of a net string;

5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and

6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours December 18, 2008, through 2400 hours January 2, 2009, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of the rule by the AA.

#### **Classification**

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete.

Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30-day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means upon issuance of the rule by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program

and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (ADDRESSES).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

**Authority:** 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3)

Dated: December 10, 2008.

**Samuel D. Rauch III,**

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

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[1018-AT50]

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[0648-AX15]

### 50 CFR Part 402

#### Interagency Cooperation Under the Endangered Species Act

**AGENCIES:** U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service; National Oceanic and Atmospheric Administration; Commerce.

**ACTION:** Final rule.

**SUMMARY:** With this final rule, the United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively, “Services” or “we”) amend regulations governing interagency cooperation under the Endangered Species Act of 1973, as amended (ESA). This rule clarifies several definitions, provides assistance as to when consultation under section 7 is necessary, and establishes time frames for the informal consultation process.

**DATES:** *Effective Date:* This rule is effective January 15, 2009.

**FOR FURTHER INFORMATION CONTACT:** Office of the Assistant Secretary for Fish and Wildlife and Parks, 1849 C Street, NW., Washington, DC 20240; *telephone:*

202-208-4416; or James H. Lecky, Director, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; *telephone:* 301-713-2332.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Endangered Species Act of 1973, as amended (“ESA”; 16 U.S.C. 1531 *et seq.*) provides that the Secretaries of the Interior and Commerce (the “Secretaries”) share responsibilities for implementing most of the provisions of the ESA. Generally, marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the Fish and Wildlife Service and by the Secretary of Commerce through the Administrator of the National Oceanic and Atmospheric Administration to the Assistant Administrator for National Marine Fisheries Service.

In this rule, we refer to the Fish and Wildlife Service as FWS and the National Marine Fisheries Service as NMFS. The word “Services” refers to both FWS and NMFS. We use the word “Service” when we describe a situation that could apply to either agency. We use the term “1986 regulations” to reference the 1986 section 7 regulations found at 50 CFR Part 402.

##### Procedural Background

On August 15, 2008, the Services published the Proposed Rule. The public was given 30 days to comment. On September 15, 2008, that comment period was extended by 30 days. Approximately 235,000 comments were received; of these, approximately 215,000 were largely similar “form” letters.

##### Changes From Proposed Rule in Responses to Comments

After reviewing the public comments and further interagency discussion, the Services made certain clarifications and modifications in the final rule. The parts of the rule that were changed are set out immediately below. Those changes are discussed in more detail in a section-by-section analysis of comments set out later in this preamble.

##### Definitions (§ 402.02)

The proposed rule set out a new definition for “Biological Assessment”. In the final rule, a sentence was added to the end of the definition. The additional sentence requires that the Federal agency provide the Services a specific guide or statement as to the

location of the relevant consultation information, as described in 402.14, in any alternative document submitted in lieu of a biological assessment.

The proposed rule set out a new definition of “cumulative effects.” No changes were made to the definition of cumulative effects in the final rule.

The proposed rule set out a new definition of “Effects of the Action”. In the final rule, a definition of “direct effects” was added and the fourth sentence of the proposed rule was changed.

##### Applicability—(§ 402.03)

The proposed rule set out a new applicability section. In the final rule, paragraph (b)(2) and paragraph (b)(3)(i) were changed and paragraph (b)(3)(iii) was deleted. Specifically, paragraph (b)(2) deleted language that “such action is an insignificant contributor to any effects on a listed species or critical habitat” and replaced it with language that the effects of such action are manifested through global processes and cannot be reliably predicted or measured at the scale of a listed species’ current range; or, would result at most in an extremely small, insignificant impact on a listed species or critical habitat; or, are such that the potential risk of harm to a listed species or critical habitat is remote. Paragraph (b)(3)(i) was changed by moving the word “meaningful” to directly before the word “evaluation.” Finally, paragraph (b)(3) was deleted in its entirety.

##### Informal Consultation (§ 402.13)

The proposed rule amended the informal consultation procedures. In the final rule, a sentence was added to the end of paragraph (b) and a paragraph (c) was added. Specifically, a sentence was added to the end of paragraph (b) to set out that if the Federal agency terminates consultation at the end of the 60-day period, or if the Service’s extension period expires without a written statement whether it concurs with a Federal agency’s determination provided for in paragraph (a) of this section, the consultation provision in section 7(a)(2) is satisfied. Paragraph (c) was added to the final rule to provide that notwithstanding the provisions of paragraph (b) the Service, the Federal agency, and the applicant, if one is involved, may agree to extend informal consultation for a specific time period.

##### Formal Consultation (§ 402.14)

The proposed rule made a change to the formal consultation procedures. In the final rule, we changed the “exception” language in § 402.14 to note that informal consultation may be