

migration zones and avoids hardening of stream banks and shorelines.

(F) The MRCI development ordinance or plan adequately protects wetlands and wetland functions, including isolated wetlands.

(G) The MRCI development ordinance or plan adequately preserves the hydrologic capacity of permanent and intermittent streams to pass peak flows.

(H) The MRCI development ordinance or plan includes adequate provisions for landscaping with native vegetation to reduce need for watering and application of herbicides, pesticides, and fertilizer.

(I) The MRCI development ordinance or plan includes adequate provisions to prevent erosion and sediment run-off during construction.

(J) The MRCI development ordinance or plan ensures that water supply demands can be met without impacting flows needed for threatened salmonids either directly or through groundwater withdrawals and that any new water diversions are positioned and screened in a way that prevents injury or death of salmonids.

(K) The MRCI development ordinance or plan provides necessary enforcement, funding, reporting, and implementation mechanisms and formal plan evaluations at intervals that do not exceed 5 years.

(L) The MRCI development ordinance and plan complies with all other state and Federal environmental and natural resource laws and permits.

(ii) The city, county or regional government provides NMFS with annual reports regarding implementation and effectiveness of the ordinances, including: any water quality monitoring information the jurisdiction has available; aerial photography (or some other graphic display) of each MRCI development or MRCI expansion area at sufficient detail to demonstrate the width and vegetation condition of riparian set-backs; information to demonstrate the success of stormwater management and other conservation measures; and a summary of any flood damage, maintenance problems, or other issues.

(iii) NMFS finds the MRCI development activity to be consistent with the conservation of threatened salmonids' habitat when it contributes to the attainment and maintenance of properly functioning habitat conditions. For this purpose, NMFS defines properly functioning habitat conditions as the sustained presence of a watershed's habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. To

contribute to the attainment and maintenance of properly functioning habitat conditions, activities that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward achieving properly functioning habitat conditions. Periodically, NMFS will evaluate an approved program for its effectiveness in maintaining and achieving habitat function that provides for conservation of the listed salmonids. Whenever warranted, NMFS will identify to the jurisdiction ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions, or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the threatened species. If any jurisdiction within the limit does not make changes to respond adequately to the new information in the shortest amount of time feasible, but not longer than 1 year, NMFS will publish notification in the **Federal Register** announcing its intention to withdraw the limit so that take prohibitions would then apply to the program. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) prohibitions.

(iv) Prior to approving any city, county, or regional government ordinances or plans as being within this limit, or approving any substantive change in an ordinance or plan as being within this limit, NMFS will publish notification in the **Federal Register** announcing the availability of the ordinance or plan or the draft changes for public review and comment. Such an announcement will provide for a comment period of not less than 30 days.

(c) *Affirmative Defense.* In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened species of salmonids listed in § 223.102 (a)(3), (a)(5) through (a)(10) and (a)(12) through (a)(22), any person claiming the benefit of any limit listed in paragraph (b) of this section or § 223.209(a) shall have a defense where the person can demonstrate that the limit is applicable and was in force, and that the person fully complied with the limit at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the

proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

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Appendix A to §223.203 - List of Guidance Documents

The following is a list of documents cited in the regulatory text. Copies of these documents may be obtained upon request from the Northwest or Southwest Regional Administrators (see Table 1 in § 600.502 of this title).

1. Oregon Department of Transportation (ODOT) Maintenance Management System Water Quality and Habitat Guide (July, 1999).
2. Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act.
3. Fish Screening Criteria for Anadromous Salmonids, National Marine Fisheries Service, Southwest Region, 1997.
3. Fish Screening Criteria for Anadromous Salmonids, National Marine Fisheries Service, Southwest Region, 1997.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 001128334-1312-02; I.D. 091401B]

RIN 0648-AN88

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

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to amend the regulations that implement the Atlantic Large Whale Take Reduction Plan (ALWTRP) to clarify its authority to temporarily restrict the use of lobster trap and gillnet fishing gear within defined areas to protect North Atlantic right whales, and to establish criteria and procedures for implementing a Dynamic Area Management (DAM) program in areas north of 40° N. latitude, in order to further reduce risk of entanglement of right whales by such gear.

DATES: This final rule is effective February 8, 2002.

ADDRESSES: Copies of the Environmental Assessment (EA), its Regulatory Impact Review (RIR), and the

Final Regulatory Flexibility Analysis (FRFA), are available from the Protected Resources Division, NMFS, 1 Blackburn Drive, Gloucester, MA 01930-2298. Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, progress reports on implementation of the ALWTRP, and a table of the changes to the ALWTRP may be obtained by writing to Diane Borggaard at the address above or Katherine Wang, NMFS/Southeast Region, 9721 Executive Center Dr., St. Petersburg, FL 33702-2432. Copies of the EA, including the RIR and FRFA, can be obtained from the ALWTRP website listed under the Electronic Access portion of this document.

FOR FURTHER INFORMATION CONTACT:

Diane Borggaard, NMFS, Northeast Region, 978-281-9145; Katherine Wang, NMFS, Southeast Region, 727-570-5312; or Patricia Lawson, NMFS, Office of Protected Resources, 301-713-2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for this final rule and the take reduction planning process can be downloaded from the ALWTRP web site at <http://www.nero.nmfs.gov/whaletrp/>. Copies of the most recent marine mammal Stock Assessment Reports may be obtained by writing to Richard Merrick, NMFS, 166 Water St., Woods Hole, MA 02543 or can be downloaded from the Internet at <http://www.wh.who.edu/psb/sar2000.pdf>. In addition, copies of the document entitled "Defining Triggers for Temporary Area Closures to Protect Right Whales from Entanglements: Issues and Options" are available by writing to Diane Borggaard, (see ADDRESSES) or can be downloaded from the Internet at <http://www.nero.nmfs.gov/whaletrp/>.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the level of serious injury and mortality of four species of large whales (fin, humpback, minke, and North Atlantic right) in East Coast lobster trap and finfish gillnet fisheries. The background for the take reduction planning process and development of the ALWTRP is provided in the preambles to the proposed (62 FR 16519, April 7, 1997), the interim final (62 FR 39157, July 22, 1997), final (64 FR 7529, February 16, 1999), and interim final (65 FR 80368, December 21, 2000) rules implementing the ALWTRP. Copies of these documents and supporting Environmental

Assessments are available from the NMFS, Northeast Region (see ADDRESSES).

This final rule implements approved modifications to the ALWTRP deemed by NMFS necessary to satisfy requirements of the Endangered Species Act (ESA) and MMPA. Details concerning the justification for and development of the DAM program and the implementing regulations were also provided in the preamble to the proposed rule (66 FR 50160, October 2, 2001) and are not repeated here.

DAM Trigger Mechanism

Areas that will be considered for DAM are limited to areas north of 40° N latitude. A DAM zone will be triggered by a single reliable report from a qualified individual of 3 or more right whales within an area (75 nautical miles (nm²) (139 km²)) such that right whale density is equal to or greater than 0.04 right whales per nm² (1.85 km²). 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 based upon which a DAM zone would be triggered.

Procedures and Criteria to Establish a DAM Zone

NMFS will use the following procedures and criteria to establish a DAM zone:

1. A circle with a radius of at least 2.8 nm (5.2 km) would be drawn around each individual sighting (event). This radius would be adjusted for the number of right whales seen in the sighting such that the density of 4 right whales per 100 nm² (185.3 km²) is maintained. The length of the radius would be determined by taking the inverse of the 4 right whales per 100 nm² (185.3 km²) density, which is 24 nm² (44.5 km²) per whale. This is equivalent to a radial distance of 2.8 nm (5.1 km) for a single right whale sighted, 3.9 nm (7.3 km) for two whales, 4.8 nm (8.9 km) for three whales, etc.

2. If any circle or group of contiguous circles includes 3 or more right whales, this core area and its surrounding waters would be a candidate DAM zone.

Criteria to Determine the Extent of the DAM Zone

Once NMFS identifies a core area containing 3 or more right whales, as described here, it would expand this initial core area to provide a buffer in which the right whales could move and still be protected. NMFS will determine the extent of the DAM zone as follows:

1. A larger circular zone will be drawn to extend 15 nm (27.8 km) from the perimeter of a circle around each core area.
2. The DAM zone will then be defined by a polygon drawn outside, but tangential to the circular buffer zone(s). The latitudinal and longitudinal coordinates of the corners of the polygon will then be identified.

Decision Factors for Implementing Restrictions in a DAM Zone

Once a DAM zone is identified, NMFS will determine whether to impose, in the zone, restrictions on fishing and/or fishing gear. This determination would be based on a variety of 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.

Public Notification

If NMFS determines restrictions are necessary in the zone, NMFS may require removal of all gillnet and lobster trap gear from the zone within 2 days of the publication of a notice in the **Federal Register**. At this time, NMFS does not have criteria developed that would allow gillnet or lobster trap gear to be fished within a DAM zone. NMFS may allow fishing within a DAM zone with specified gear if that gear is determined to sufficiently reduce the risk of entanglement to right whales. NMFS may identify acceptable fishing practices and gear in a **Federal Register** document. Gear not in compliance with the imposed restriction may not be set in the DAM zone after the effective date of the restriction. NMFS will publish a document in the **Federal Register** and other appropriate media announcing the establishment of the zone with restrictions imposed. It will also announce them immediately upon filing the document with the Office of the **Federal Register**, which is generally 3 to 5 days before publication of the notice in the **Federal Register**.

If NMFS decides not to implement restrictions within a DAM zone, it will issue an alert to fishermen using

appropriate media to inform them of the fact that right whale density in a certain area has triggered a DAM zone. In addition, NMFS will provide detailed information on the location of the DAM zone and the number of animals sighted within it.

Duration of DAM Zones

NMFS will maintain a DAM zone for a minimum of 15 days from the date NMFS issues an alert (in the case of a zone where no restrictions are imposed), or the 15-day period from the effective date of restrictions (in the case where restrictions are imposed). At the conclusion of a 15-day period, the DAM zone would automatically expire, unless whales are still sighted in the DAM zone, in which case, NMFS will continue the zone to further protect concentrations of right whales. Each extension would be for up to 15 days unless NMFS extends the time frame based on additional sightings.

NMFS may remove restrictions on the DAM zone or rescind an alert prior to its automatic expiration if there are survey efforts and no confirmed sightings of right whales by qualified individuals for 1 week or if other credible evidence indicates that right whales have left the designated zone. NMFS will notify the public by issuing a notification in the **Federal Register** and through other appropriate media.

Comments and Responses

Approximately 58 letters of comment were received during the public comment period on the proposed rule, which ended on November 1, 2001. A complete summary of the comments and NMFS' responses is provided here.

Comment 1: Several letters were received from private individuals in support of NMFS' proposal to implement DAM. Most of those letters expressed serious concerns about the future survival of North Atlantic right whales. In addition, these comments encouraged NMFS to work closely with gillnet and lobster fishermen to protect right whales from future entanglements in fishing gear.

Response: NMFS will continue to work with the ALWTRT and members of the fishing industry to minimize interactions between right whales and fishing gear. NMFS believes that DAM will reduce serious injuries and mortalities to right whales from entanglements by temporarily restricting lobster trap and gillnet fishing gear in areas where right whales congregate to feed. *Comment 2:* Several comments questioned the DAM trigger mechanism. Many felt that it was inappropriate to base a DAM zone on a single sighting by

one person. In addition, the Maine Department of Marine Resources requested that NMFS determine a clearer definition of "qualified individual." It was suggested that NMFS establish a tiered process for judging whether or not a report is credible and further suggested that NMFS request corroborating information from the individual providing the report while continuing to verify the initial report during the 5-to 7-day period between filing notice with the **Federal Register** and publication. Furthermore, there were concerns that false sightings would be reported by disgruntled crew or competitors identifying themselves as "qualified individuals" wishing to cause hardship on fishermen by closing down their fishing grounds.

Response: NMFS anticipates that it may receive false or exaggerated reports of right whale sightings from people claiming to be "qualified individuals." Therefore, NMFS intends to thoroughly investigate all reports for credibility and reliability. The definitions of "qualified individual" and "reliable report" were developed with this intent in mind. In addition, NMFS will require that the individual providing the report identify him or herself and the vessel from which the sighting was made. Anonymous reports will not be considered reliable and, therefore, cannot trigger a DAM zone. Furthermore, a document prepared by the Northeast Fisheries Science Center entitled, "Defining Triggers for Temporary Area Closures to Protect Right Whales from Entanglements: Issues and Options," concluded that a single sighting is appropriate because foraging whales are at risk of entanglement whenever they are feeding, regardless of how quickly a food source is consumed. (Clapham and Pace, 2001). Therefore, to trigger a DAM zone, NMFS feels that a single report of right whales is an adequate trigger mechanism. Simply stated, as long as a single sighting can establish that the whales are feeding in an area, and not merely transiting through, no additional sightings would be necessary based on the understanding that feeding whales are at a greater risk of entanglement.

Comment 3: Many commenters questioned the implementation of a DAM zone based on the proposed trigger of three right whales. Comments from lobstermen and state agencies indicated that NMFS should adopt the trigger of eight whales sighted twice over 2 days, which was discussed at the ALWTRT meeting. Commenters encouraged NMFS to explore all other information available to ensure that the

three-whale trigger is appropriate for the implementation of a DAM zone.

Response: The issue of the number of right whales that would trigger a DAM zone was discussed at the ALWTRT meeting. However, the ALWTRT did not produce any consensus recommendations on any one set of whale density criteria and/or triggering levels. NMFS determined that a trigger based on the sighting of three right whales was appropriate after considering the analysis of sighting data performed by the Northeast Fisheries Science Center. Foraging whales are assumed to be at risk of entanglement and DAM was designed to respond quickly to situations where feeding whales and fishing gear overlap in order to reduce the chances that a whale will get entangled. Therefore, the scientific research conducted on DAM sought to establish the smallest number of right whales that could be advanced as a reliable indicator that the animals were engaged in feeding behavior. The scientists concluded that a sighting of three or more right whales in an area was a reasonably good indicator that the animals were residing in an area to feed. (Clapham and Pace, 2001).

Comment 4: Comments were received expressing concern about the size of the DAM zone. In particular, several lobstermen felt that it would take months to remove their gear from a DAM area of 1,000 nm or more and suggested that DAM areas of 10 nm would be more realistic for compliance by the industry. One lobsterman estimated that it would take 12 trips, each lasting up to 10 days, to remove gear from a 1,000-nm DAM zone. In addition, many comments from fishermen explained that if all gear is removed from the DAM zone it will be reset around the boundary of the area, thus creating a wall around the DAM zone, which may create a greater risk of entanglement to right whales.

Response: NMFS appreciates the amount of effort that may be required to remove gillnet and lobster trap gear from a DAM zone. The analysis of sighting data presented in the document "Defining Triggers for Temporary Area Closures to Protect Right Whales from Entanglements: Issues and Options," found that a 15-nm buffer around the initial core area would enclose all of the whales sighted, irrespective of their movements during the course of the event. (Clapham and Pace, 2001). The size of the DAM zone is dependent on the number of whales that would trigger an event.

Comment 5: Several comments were received that expressed concerns about the amount of time proposed for

compliance with gear restrictions within DAM zones. For example, a comment received from a lobsterman stated that it would be impossible to remove all lobster gear in the time allotted under the proposed rule and, furthermore, the chaos and confusion created would present a safety hazard.

Response: NMFS appreciates the time, effort, and risk involved in hauling fishing gear and removing it from an area that has been designated for DAM. In order to provide fishermen with time to respond to the implementation of gear restrictions within a DAM zone, NMFS will issue a notice at the time the notice is filed with the Office of the **Federal Register**, which is usually 3 to 5 days prior to the regulation being published in the **Federal Register**. Once the decision has been made to remove gear from a DAM zone, NMFS will notify the commercial fisheries affected as quickly and comprehensively as reasonably possible. In addition, when a right whale sighting meets the DAM trigger, NMFS will issue an alert via email to all ALWTRT members and post the alert on the website at www.nero.nmfs.gov/whaletrp/. NMFS hopes that members of the ALWTRT who receive an alert will circulate the information to other interested parties to help insure that the fishermen who may have to eventually remove gear from a DAM zone have time to respond. Fishermen, industry representatives, environmental groups, and all others interested in receiving alerts and notices over the Internet should provide their email address to the Northeast Regional Office (See **ADDRESSES** section). NMFS will also mail letters providing notice to those who request it by contacting the Northeast Regional Office (See **ADDRESSES** section). In addition, NMFS will investigate using a news bulletin service to provide notice through the local press.

Comment 6: Several comments were received that questioned the length of the restricted period. In particular, the Massachusetts Division of Marine Fisheries felt that the rule making process and the time required for fishermen to remove all of their gear from a DAM area would exceed the duration of most sighting "events."

Response: NMFS intends to respond to reports of right whale sightings that trigger a DAM as quickly as possible in order to insure that restrictions are implemented in a timely fashion to maximize protection for the animals. See NMFS' response to the previous comment. NMFS believes that an initial restricted period of 15 days with the ability for extension is an adequate and appropriate management measure for

protecting right whales. Research conducted by the Northeast Fisheries Science Center concluded that a 15-day restricted period represented the average mean duration of the 13 documented events that began with an initial sighting of three or more right whales. (Clapham and Pace, 2001). Therefore, based on these findings, NMFS established an initial restricted period of at least 15-days with additional extensions to the restricted period if whales continue to meet the trigger for DAM.

Comment 7: A comment from an environmental group expressed concern with the automatic expiration of the DAM zone after 15 days and felt that NMFS should be required to lift restrictions, through notification in the **Federal Register**, once the whales are no longer sighted in the area.

Response: NMFS intends to provide protection for concentrations of right whales that remain present in the area after the conclusion of the 15-day period, if necessary and appropriate, by extending the restricted period, through notification in the **Federal Register**. NMFS believes that an initial restricted period of 15 days with the ability for extension is an adequate and appropriate management measure for protecting right whales. Research conducted by the Northeast Fisheries Science Center concluded that a 15-day restricted period represented the average mean duration of the 13 documented events that began with an initial sighting of three or more right whales. (Clapham and Pace, 2001). Therefore, based on these findings, NMFS established an initial restricted period of at least 15 days with additional extensions to the restricted period if whales continue to meet the trigger for DAM.

Comment 8: Several comments were received from fishermen who felt it is unnecessary to implement DAM because the gear they are currently utilizing is already considered "whale safe". Lobstermen fishing in Cape Cod Bay with sinking and neutrally buoyant line and weak links felt that this gear adequately reduces the risk of serious injury or mortality to right whales from entanglements without NMFS requiring further alterations or requiring the removal of gear from the area. Lobstermen also expressed concerns about the economic impact of DAM on their business and added that changing over to neutrally buoyant and sinking line has already been very costly, and expressed displeasure at what was perceived as NMFS' apparent disregard for the efforts of the ALWTRT towards developing gear that can coexist with

whales without making closures necessary. In addition, the Massachusetts Division of Marine Fisheries (DMF) encouraged NMFS to adopt more universal "whale safe" gear modifications instead of implementing DAM because improving devices, such as buoy line breakaways, eliminates the need to completely remove gear from an area. Conversely, several environmental groups commenting on this issue recommended that NMFS require the removal of all lobster trap and gillnet gear from the DAM zone, in light of the fact that NMFS and the ALWTRT can not agree on gear modifications that sufficiently reduce the risk of entanglement.

Response: NMFS will continue to work with the ALWTRT to modify and develop fishing gear that adequately reduces the risk of entanglement to large whales and when such gear is deemed adequate, NMFS may allow it to be used for fishing within DAM zones. In addition, NMFS encourages fishermen to collaborate with the gear research team towards developing fishing gear that completely reduces the risk of entanglement to right whales. However, until then, the most reliable means for reducing the risk of entanglements to right whales within DAM zones is by requiring the complete removal of all lobster trap and gillnet fishing gear. See response to comment 18.

Comment 9: A comment from an environmental group questioned how NMFS planned to enforce voluntary compliance with gear restrictions within DAM zones.

Response: In the event that right whale sightings trigger a DAM zone, NMFS will determine whether to impose restrictions on fishing and/or fishing gear. This determination will be based on a variety of 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 to 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. If NMFS determines restrictions are necessary in the zone, NMFS may require removal of all gillnet and lobster trap gear from the zone within two days of the publication of the notice in the **Federal Register**. If NMFS decides not to implement restrictions within the DAM zone, NMFS will follow the protocol developed cooperatively between NMFS and the ALWTRT for voluntary compliance. NMFS will issue an alert to fishermen using appropriate media to inform them of the fact that right whale density in a certain area has triggered a

DAM zone. In addition, NMFS will provide detailed information on the location of the DAM zone and the number of animals sighted within it. Furthermore, NMFS will request that fishermen voluntarily remove lobster trap and gillnet gear from the DAM zone and no additional gear be set inside it. NMFS believes providing this information to interested parties and requesting compliance with gear restrictions, which is in every fisherman's interest, is an appropriate means for maintaining communication with industry while providing protection for right whales.

Comment 10: Several comments suggested that the regulation of state waters would be better served if left to state agencies. Specifically, lobstermen fishing in Cape Cod Bay felt that NMFS should follow the Massachusetts DMF approach to developing rules to reduce entanglements. Other commenters from the lobster fishing industry expressed opposition to Federal regulations that would supersede rules already imposed within state waters because of the feeling that DMF knows the state waters better than NMFS. In addition, a comment received from a member of the lobster industry encouraged NMFS to allow the State of Maine to assess and provide the appropriate regulations in consideration of the unique variability and spacial distribution between right whales and fishing gear off the Maine coast. The Maine Department of Marine Resources echoed these concerns and also believed that the state whale protection plans offer the greatest chance of success.

Response: Although the MMPA provides NMFS with authority to regulate in State waters, states can develop equally protective or more protective restrictions if they choose, and NMFS encourages such action. Further, NMFS has cooperative agreements in place with a number of Atlantic states, which enable states to enforce requirements of the MMPA and its implementing regulations.

NMFS tries to coordinate with states on other issues as well. For example, with regard to gear markings that yield individual vessel information, many of the state and Federal fishery management plans currently require marking of buoys and/or traps with individual vessel identification. NMFS plans to continue to work with state fisheries agencies to investigate gear marking coast-wide and identify gaps in marking of surface gear, gillnets, and traps. This information will be presented to the ALWTRT for future consideration

Comment 11: Comments were received that expressed concerns about the procedure for providing notice to fishermen in the event of a DAM closure. For example, the Massachusetts DMF felt that the May 2001, DAM closure was a failure because NMFS did not contact all of the fishermen affected and questioned whether NMFS could dedicate the staff time to informing fishermen of future DAM closures. Another commenter questioned how NMFS would provide notification to fishermen prior to the publication in the **Federal Register**.

Response: Once the decision has been made to remove gear from a DAM zone, based on the criteria outlined in the preamble, NMFS will notify the commercial fisheries affected as quickly and comprehensively as possible. In order to provide fishermen with time to respond to the implementation of gear restrictions within a DAM zone, NMFS will issue a notice at the time the notice is filed with the Office of the **Federal Register**, which is usually 3 to 5 days prior to publication in the **Federal Register**. In addition, when a right whale sighting meets the DAM trigger, NMFS will issue an alert via email to all ALWTRT members and post the alert on the website at www.nero.nmfs.gov/whaletrp/. NMFS hopes that members of the ALWTRT who receive an alert will circulate the information to other interested parties to help insure that the fishermen who may have to eventually remove gear from a DAM zone have time to respond. Fishermen, industry representatives, environmental groups, and all others interested in receiving alerts and notices over the internet should provide their e-mail address to the Northeast Regional Office. (See the **ADDRESSES** section). NMFS will also mail letters providing notice to those who request it by contacting the Northeast Regional Office in addition to posting such notification on the Northeast Regional Office web site at www.nero.nmfs.gov. In addition, NMFS will investigate using a news bulletin service to provide notice through the local press.

Comment 12: Several commenters pointed out that the procedure for creating a DAM zone in the proposed rule differed from how the process is described in the document "Defining Triggers for Temporary Area Closures to Protect Right Whales from Entanglements: Issues and Options."

Response: NMFS agrees and this inconsistency has been corrected in this final rule. The justification and rationale for the correction can be found in the preamble of this final rule under

"Changes in the Final Rule from the Proposed Rule."

Comment 13: Many comments received questioned the decision factors NMFS proposed when considering whether to impose restrictions on fishing and/or fishing gear within a DAM zone. In particular, several environmental groups felt that, except for the consideration of weather conditions as they relate to the safety of life at sea, the factors listed in the proposed rule should not influence the decision to impose restrictions on fishing because such restrictions should be automatic once a concentration of right whales triggers a DAM zone. It was also noted that NMFS should require the complete removal of all gear automatically once a DAM zone has been triggered. A letter from the Marine Mammal Commission also expressed concerns over the discretion reserved by NMFS with respect to whether to impose restrictions within a DAM zone and felt that the factors should only be considered for setting a deadline when gear should be removed.

Response: NMFS believes that the agency should be provided with some level of discretion when deciding whether to impose gear restrictions within a DAM zone. Therefore, NMFS will base its decision on the enumerated factors that are relevant based on the circumstances surrounding the implementation of a DAM zone.

Comment 14: Several comments from environmental groups expressed concerns over the proposed regulatory language which provides NMFS with the option of deciding whether or not to require the complete removal of lobster trap and gillnet gear from a DAM zone. For example, one commenter felt that this discretion merely maintains the status quo and, therefore, would not sufficiently reduce jeopardy. Another commenter felt that, because NMFS and the ALWTRT cannot agree on gear modifications that would sufficiently reduce the risk of entanglement to right whales, NMFS should require the complete removal of all lobster trap and gillnet gear from the DAM zone.

Response: NMFS believes that reserving the discretion to decide whether to implement gear restrictions within DAM zones gives the agency a reasonable amount of flexibility to respond to the vast multitude of scenarios under which a DAM zone may be triggered. NMFS feels that DAM, in combination with the proposed rules for Seasonal Area Management (SAM) and additional gear modifications, are collectively sufficient to remove the likelihood of jeopardy to the continued existence of North Atlantic right whales.

DAM was specifically included as one of the multiple management components to the Reasonable and Prudent Alternative (RPA) discussed in the four BOs on the Fishery Management Plans for spiny dogfish, monkfish, multispecies, and Federal regulations for the American lobster fishery. According to the RPA, DAM, SAM, and expanded gear modifications were developed to cumulatively eliminate serious mortality and serious injuries of right whales in gillnet and lobster trap gear, eliminate serious and prolonged entanglements, and significantly reduce the total number of right whale entanglements in gillnet and lobster trap gear. NMFS does not feel that reserving the discretion on deciding whether to implement gear restrictions within DAM zones implies that the agency will fail to respond when sightings of right whales trigger DAM. In addition, while NMFS feels that, at the current time, requiring the complete removal of gillnet and lobster trap gear from within a DAM zone is the appropriate means for reducing the risk of entanglement to right whales, the agency continues to encourage fishermen and gear researchers to work on innovating and developing ways to improve fishing gear to avoid serious injury and mortality from entanglements. In recognition of the fact that gear research and development is ongoing, NMFS felt it was important to maintain the option of allowing fishing with "risk averse" gear inside a DAM zone in the event that such gear is perfected and approved.

Comment 15: One commenter suggested that NMFS clarify the circumstances under which a DAM would continue and how it would be limited. The commenter expressed concern regarding a hypothetical situation where, during the 15-day restricted period for a DAM zone, a second grouping of whales triggered another separate DAM zone outside but adjacent to the initial zone specified in the notice. Based on this scenario, the commenter was concerned that the initial DAM zone would be enlarged to create a single, very large closure.

Response: In the event that right whales are sighted and a DAM zone is triggered, NMFS would maintain the area for at least 15 days. If a DAM zone is triggered, but no restrictions are implemented, the 15-day period would begin from the time NMFS issues the alert. If, on the other hand, NMFS implements gear restrictions within the DAM zone, the 15-day period would begin on the date the restrictions become effective (i.e., 2 days after publication in the **Federal Register**). In

response to the hypothetical situation described, while it is possible that there may be some days that the successive DAM zones overlap, the first DAM zone will automatically expire after 15 days, unless NMFS decided to extend the restricted period to further protect concentrations of right whales. However, NMFS also has the option of removing restrictions prior to the 15-day automatic expiration if subsequent survey efforts confirm that right whales have left the designated area. The second DAM zone would be maintained separately with its own 15-day restricted period.

Comment 16: The U.S. Coast Guard commented on aerial patrols to assist in confirming sightings and enforcing restrictions within the DAM zone. Due to a re-prioritization of law enforcement missions, the Coast Guard will only be able to devote minimal aircraft hours to assist NMFS in the implementation and enforcement of DAM. In addition, surface patrols will be more limited than in the past. Finally, the U.S. Coast Guard stated that, if fishing gear is modified and approved for use within a DAM zone, the U.S. Coast Guard will not be able to assist in enforcement of those restrictions because they are not equipped or trained to haul fixed gear.

Response: NMFS greatly appreciates the support the U.S. Coast Guard has provided in the past for implementing and enforcing management programs designed to protect and conserve marine mammals. These two agencies have a strong commitment to cooperating in the development, implementation, and enforcement of programs for marine protected resources, including North Atlantic right whales and other marine mammals. NMFS acknowledges the fact that the duties of the U.S. Coast Guard have been re-prioritized in light of recent national events. NMFS notes, however, that other means of enforcing the DAM restrictions exist aside from pulling gear and that other law enforcement resources can be used to enforce DAM restrictions.

Comment 17: Several comments were received expressing concerns over the burden placed on American fishing to protect whales while only a token effort is directed towards ship strikes and Canadian fixed gear.

Response: NMFS acknowledges that ship strikes and entanglements with fishing gear of foreign flag vessels also cause serious injury and mortality to right whales. NMFS is currently addressing these threats through other means and policy discussions. NMFS is issuing this final rule specifically to address commercial fishery impacts from four fisheries. This final rule stems

from a component of the RPA resulting from consultations required under the ESA on the continued operation of the monkfish, spiny dogfish, multispecies, and lobster fisheries. However, the ALWTRP is designed to respond to the threats posed by domestic fishing gear. NMFS appreciates the continued involvement of the gillnet and lobster trap fisheries in the ALWTRT and their efforts to reduce serious injury and mortality to marine mammals, especially right whales. NMFS understands that right whales are injured and killed by other sources and will continue to work toward reduction of those impacts. For example, NMFS is currently taking into consideration recommendations from the Northeast Implementation Team for the Recovery of the Northern Right whale and the Humpback whale and the Southeast U.S. Right Whale Recovery Plan Implementation Team on ways to reduce the impacts of ship strikes from the recreational and commercial shipping sectors. In addition, NMFS is working on a proposed rule to regulate whale watching. Finally, NMFS is working with representatives from the Canadian Department of Fisheries and Oceans to develop and implement protective measures for right whales in Canadian waters.

Comment 18: A comment received from an environmental groups requested that, if NMFS is planning on allowing gear to be fished within a DAM zone that is determined to sufficiently reduce the risk of entanglement to right whales, then NMFS should clarify what constitutes a "sufficient" reduction.

Response: Although NMFS is considering gillnet and lobster trap gear modifications as part of the proposed rule for the SAM program, at present, NMFS does not have criteria developed that would allow gillnet or lobster trap gear to be fished within a DAM zone. NMFS may allow fishing within a DAM zone with specified gear if that gear is determined to sufficiently reduce the risk of entanglement to right whales. The DAM program is designed for a rapid response to the presence of right whales in areas at times that are generally unpredictable. The regulatory text and preamble of the proposed rule notes that any gear modifications determined by NMFS to sufficiently reduce the risk of entanglement to right whales would be identified in the **Federal Register** notice implementing the DAM zone. To the extent practicable, NMFS will provide a separate notification in the **Federal Register** regarding any determination that gear modifications sufficiently reduce the risk of entanglement to right

whales in DAM zones in advance of imposition of any DAM zones with those gear modifications.

Comment 19: One commenter suggested that NMFS initiate inter-agency and international cooperation to assist in the development of programs to protect right whales.

Response: NMFS notes that under section 7 of the Endangered Species Act, Federal agencies must consult with NMFS to insure that any action authorized, funded, or carried out by such agency (referred to as the "action agency") is not likely to jeopardize the continued existence of any endangered or threatened species. After discussions with the action agency, if NMFS concludes in a biological opinion that an activity is likely to jeopardize the continued existence of any endangered or threatened species, NMFS must include in its opinion any RPAs to avoid the likelihood of jeopardy to the listed species from the Federal activity. Furthermore, NMFS has established Memoranda of Agreement between several Federal agencies, such as the U.S. Navy, U.S. Coast Guard, and U.S. Army Corps of Engineers, to help better protect and recover listed species. With respect to international cooperation, NMFS is continuing to work with the Canadian government to develop and implement protective measures for right whales in Canadian waters. In addition, NMFS is working with Canadian whale biologists and support teams to improve and expand disentanglement efforts in Canadian waters.

Comment 20: One commenter suggested that NMFS issue regulations to close portions of the Right Whale Critical Habitat Areas to gillnet and lobster fishing and completely prohibit the use of "high risk" types of fishing gear in critical habitat during periods of known use by the whales.

Response: Although NMFS has not specifically defined or designated "high risk" types of fishing gear, data collected from past entanglements indicates that serious injuries and mortalities to right whales have occurred from interactions with gear used by the anchored gillnet and lobster trap fisheries. As a result, NMFS has implemented regulations that restrict the use of these gear types within right whale critical habitat during the months that the whales are present in these areas. For example, from April 1 to June 30, no lobster trap or anchored gillnet gear may be set in the Great South Channel Critical Habitat. In addition, from January 1 to May 15, anchored gillnetting is prohibited within the Cape Cod Bay Critical Habitat. Lobster trap fishing is permitted during this

restricted period within Cape Cod Bay Critical Habitat, but the gear must be set with weak links and sinking lines that reduce the risk of serious injury and mortality from entanglements.

Comment 21: NMFS should develop take reduction plans (TRPs) that would mitigate bycatch of all strategic stocks of marine mammals in commercial fisheries.

Response: NMFS has chosen to develop TRPs on particular stocks. NMFS manages multiple stocks through some TRPs such as the ALWTRP. Decisions on whether a TRP addresses single or multiple stocks is dependent on the similarities of the fisheries that impact these stocks. No take reduction team can be tasked with suggesting recommendations to mitigate bycatch of all strategic marine mammal stocks in commercial fisheries, and NMFS does not have the funds to develop additional take reduction teams at this time. Presently, NMFS is considering the take reduction teams currently formed, and the success of each TRP toward reaching the goals of the MMPA, in order to determine whether funds could be redirected to support additional take reduction teams.

Comment 22: One commenter noted that NMFS must undertake an adequate program of research and development for the purpose of devising improved fishing methods and gear so as to reduce the incidental taking of right whales in commercial fishing.

Response: NMFS is committed to gear research and development, and will expand this program as funding allows. NMFS has gear laboratories and research teams that specifically focus on gear development and testing. Additionally, NMFS contracts with researchers, individuals and companies to develop gear solutions. Many of the current TRP measures are based on the outcome of such gear research (e.g. weak links) conducted and/or funded by NMFS. The gear modifications are important to reduce interactions between right whales (and other large whales) and fishing gear to further reduce serious injury and mortality of large whales due to entanglement in fishing gear. In addition, NMFS intends to continue to support the contributions made by the ALWTRT's Gear Advisory Group. NMFS is collaborating with other organizations to host a gear workshop, tentatively scheduled for February 2002, to investigate additional options and gear enhancements for gillnet and lobster trap gear. The results of this workshop will be distributed to the ALWTRT for consideration of future gear recommendations to NMFS.

Comment 23: Several commenters

expressed concerns over the lack of notification regarding the publication of the proposed rules.

Response: Time constraints prevented NMFS from holding public hearings on the current regulations; however, NMFS used other ways to let the public know that public comments were being sought on a proposed rule to address commercial fishery/large whale interactions. In addition to publication of the proposed rule in the **Federal Register**, efforts included distributing the information to ALWTRT members who represent various stakeholder groups and provide valuable links to distribute information to the public, NOAA press release, announcement in NOAA's FishNews, and communications with state managers. NMFS will consider other means of communicating with the public and welcomes recommendations on ways to disseminate such information such as through letters to permit holders.

Comment 24: One commenter suggested that NMFS use emergency publication to expedite the process for implementing DAM.

Response: NMFS is not planning on using emergency publication to implement DAM based on the following reasons. Once the agency has determined to implement gear restrictions within a DAM zone, NMFS intends to forward the signed document to the Office of the **Federal Register** with a request for "file immediately" status. As soon as the notification is filed, NMFS will begin to notify interested parties. NMFS has found that requesting emergency publication does not significantly expedite the process for providing notice above what is being provided in this final rule. However, NMFS will consider requesting emergency publication if the particular facts of a situation indicate that doing so would be warranted.

Changes in the Final Rule from the Proposed Rule

This final rule will correct and clarify one of the criteria used to determine the extent of a DAM zone. The description of the criterion presented in the proposed rule did not accurately reflect NMFS' intent in establishing the size of a DAM zone. At issue is the location of the 15 nm (27.8 km) radius that is used to determine the size of a DAM zone.

As published in the preamble of the proposed rule, a 15-nm (27.8 km) radius from the "event epicenter" would be used to draw a larger circular zone around each core area encompassing a concentration of right whales. The event epicenter was defined in the proposed rule as the geographic center of all

sightings on the first day of an event. However, the criterion described in the proposed rule does not clearly describe the intent contained in the reference document. The reference document used to establish this criterion, "Defining Triggers for Temporary Area Closures to Protect Right Whales from Entanglements: Issues and Options" (see ADDRESSES for copies), describes the DAM zone buffer as the boundary of a circle that extends 15 nm (27.8 km) from the perimeter of a circle around the initial whale sightings or core area. The DAM zone will then be defined by a polygon drawn outside but tangential to the circular buffer zone(s). The latitudinal and longitudinal coordinates of the corners of the polygon will then be identified.

Therefore, § 229.32(g)(3)(ii) is revised to identify the DAM zone as a larger circular zone drawn to extend 15 nm (27.8 km) from the perimeter of a circle around each core area.

Classification

NMFS prepared a FRFA for this rule. A copy of this analysis is available from NMFS (see ADDRESSES). Five alternatives were evaluated, including a status quo or no action alternative, the preferred alternative (PA), and three other alternatives. A summary of that analysis follows:

(1) The "No Action" alternative would leave in place the existing regulations promulgated under the ALWTRP, but specific criteria and procedures for DAM would not be included in the regulations. The no action alternative would result in no additional economic burden on the fishing industry, at least in the short-term. However, if the status quo is maintained now, more restrictive and economically burdensome measures than those in this final rule may be necessary in the future to protect endangered right whales. The No Action alternative was rejected because it would not enable NMFS to meet the RPA measures of the BOs required under the ESA.

(2) NMFS considered but rejected an alternative that would require different triggers within each respective state jurisdiction as discussed by the ALWTRT. None of the proposals offered by the states were supported by data. No information has been presented to demonstrate the potential for these triggers to result in DAM zones that would reduce the risk of entanglement to right whales. The ALWTRT discussed having different triggers within each respective state jurisdiction. This could only be considered if the state trigger was found to be more restrictive than

the Federal trigger, which is not the case with the triggers suggested by Maine, Massachusetts and/or Rhode Island. The state triggers were evaluated as if they would apply consistently to all waters - federal and state.

(3) NMFS considered but rejected an alternative that would trigger a DAM zone using the observation of one right whale on a single day. In addition, a buffer of 15 nm would be drawn around each individual animal observed. The observation of one or two right whales does not appear to be a good indicator of residency. The trigger in this alternative is not effective at predicting residency, and thus may trigger DAM zones more often than necessary.

(4) NMFS considered but rejected an alternative in which the trigger and buffer would generally be the same as in the preferred alternative (PA) (i.e., the observation of four right whales in a 100-nm² area and the buffer would be 15 nm), however, instead of imposing a restriction requiring removal of all lobster gear, a 50-percent reduction in vertical lines would be required for lobster gear. The restrictions for gillnet gear would be the same as in the PA which requires complete removal. Based on right whale sightings data in 2000, six areas could potentially be closed. Because this alternative would require the removal of only 50 percent of vertical lines for lobster gear rather than all vertical lines (i.e. all gear), NMFS is concerned that this alternative may not be consistent with statutory objectives.

(5) The PA will temporarily restrict lobster trap and gillnet fisheries when NMFS receives a single reliable report from a qualified individual of three or more right whales within an area (75 nm²) such that right whale density is equal to or greater than 0.04 right whale per nm². Based on right whale sightings data from 1999 and 2000, a DAM zone would have been triggered four times in 1999 and six times in 2000. NMFS accepted this alternative as these DAM zones are appropriate to avoid jeopardizing the continued existence of North Atlantic right whales and enable NMFS to meet a portion of the RPA in the BO's.

The action is part of the RPA that resulted from the BOs issued by NMFS, in accordance with section 7 of the ESA, to remove the likelihood of jeopardy of North Atlantic right whales posed by the continued operation of the multispecies, spiny dogfish, monkfish and lobster fisheries. The objective of this action is to reduce the level of serious injury to and mortality of North Atlantic right whales in East Coast lobster trap and finfish gillnet fisheries.

NMFS has taken steps to minimize the significant economic impact on small entities through this PA by reserving discretion to issue an alert or impose gear restrictions, rather than closing DAM areas, if these measures would be sufficient to protect concentrations of right whales. The small entities affected by this final rule are gillnet and lobster trap fishermen. The geographic areas for consideration for DAM are limited to areas north of 40° N latitude. Since DAM will be used to respond to unusual and unexpected sightings of right whales, it is difficult for NMFS to predict exactly where DAM zones may be implemented in the future. It is difficult to quantify the economic impacts of NMFS using its discretion in implementing 50 CFR 229.32(g)(2) as the restrictions that will be are unknown at this time in addition to the unknowns of the particular event such as the time and location of the restrictions and the level of fishing effort at that time and location. Therefore, providing an accurate estimate of the number of small entities that will be affected is problematic. Based on the available data, a maximum of 7,539 state and federally permitted lobster vessels and 310 gillnet vessels, which includes federally permitted vessels and may include state permitted vessels, could be affected by this action. However, NMFS does not expect that number of vessels to be affected by any one DAM closure because of the limited size of a DAM zone. For example, the retrospective analysis of the April-May 2000 DAM Area 1 estimated that 210 lobster vessels and 42 gillnet vessels would have been affected by the hypothetical closure.

NMFS received two public comments relating to the economic impacts of this final rule. These comments were considered by NMFS before it approved this final rule and are characterized and responded to by NMFS in the "Comments and Responses" section of the preamble to this final rule, as comment/response numbers four and eight. No changes to the rule were made as a result of these comments.

This action contains no new reporting or record keeping requirements. There are no relevant Federal rule actions that duplicate, overlap, or conflict with this action.

NMFS determined that this action is consistent to the maximum extent practicable with 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. No state disagreed

with our conclusion that the rule is consistent with the enforceable policies of the approved coastal management program for that state.

This final rule contains policies with federalism implications that were sufficient to warrant preparation of a federalism assessment under Executive Order 13132. Accordingly, the Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed action to the appropriate official(s) of affected state, local and/or tribal government in October 2001. No comments on the federalism implications of the proposed action were received in response to this notification. However, one affected state did respond on the federalism implications during the comment period for the proposed rule. The comment is characterized and responded to by NMFS in the "Comments and Responses" section of the preamble to this final rule, as comment/response number 10. No changes to the rule were made as a result of the comment received.

This final rule implements a portion of the RPA, which resulted from ESA section 7 consultations on three FMPs for the monkfish, spiny dogfish, and Northeast multispecies fisheries, and the Federal regulations for the American lobster fishery. This final rule implements a component of the RPA contained in the BOs issued by NMFS on June 14, 2001. Therefore, no further section 7 consultation is required.

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

References

ALWTRT. 2001. Draft Atlantic Large Whale Take Reduction Team Meeting Summary. Summary prepared by RESOLVE, Inc. and submitted to the National Marine Fisheries Service July 16, 2001.

Bisack, K. 2001. Economic analysis of Wilkinson Basin closure. Northeast Fisheries Science Center, 166 Water Street, Woods Hole, MA. 02543.

Bisack, K. 2001. (Draft) Economic analysis of dynamic area management (DAM). Northeast Fisheries Science Center, 166 Water Street, Woods Hole, MA. 02543.

Clapham, P.J. and R.M. Pace, III. 2001. Defining Triggers for Temporary Area Closures to Protect Right Whales from Entanglements: Issues and Options. Northeast Fisheries Science Center Reference Document 01-06. April 2001.

National Marine Fisheries Service. 2000. Environmental Assessment of the Atlantic Large Whale Take Reduction Plan and Implementing Regulations.

NMFS. Northeast Region. December 2000.

National Marine Fisheries Service. 2001. Preliminary estimates of the revenue losses to the gillnet and lobster fleet in 1999 due to potential dynamic area closures to protect right whales. NMFS. Northeast Region. March 2001.

National Marine Fisheries Service. 2001. Endangered Species Act section 7 consultation. Biological opinion regarding Fishery Management Plans for monkfish, spiny dogfish, and multispecies and Federal regulations for American lobster. June 14, 2001.

Dated: December 31, 2001.

Rebecca Lent,

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

List of Subjects in CFR Part 229

Administrative practice and procedure, Fisheries, Marine mammals, Reporting and record keeping requirements.

For the 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 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

2. In § 229.2, a definition of "Qualified individual" and "Reliable report" are added in alphabetical order to read as follows:

§ 229.2 Definitions.

* * * * *

Qualified individual means 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.

* * * * *

Reliable report means a credible right whale sighting report based upon which a DAM zone would be triggered.

* * * * *

3. In § 229.32, paragraph (g)(3) is added to read as follows:

§ 229.32 Atlantic large whale take reduction plan regulations.

* * * * *

(g)***

(3) For the purpose of reducing the risk of fishery interactions with right whales, NMFS may establish a temporary Dynamic Area Management (DAM) zone in the following manner:

(i) *Trigger.* Upon receipt of a single reliable report from a qualified individual of three or more right whales within an area NMFS will plot each individual sighting (event) and draw a circle with a 2.8 nm (5.2 km) radius around it, which will be adjusted for the number of right whales sighted such that a density of at least 0.04 right whales per nm² (1.85 km²) is maintained within the circle. If any circle or group of contiguous circles includes 3 or more right whales, NMFS would consider this core area and its surrounding waters a candidate DAM zone.

(ii) *DAM zone.* Areas for consideration for DAM zones are limited to areas north of 40° N latitude. Having identified any circle or group of contiguous circles including 3 or more right whales as candidates for protection, as identified in paragraph (g)(3)(i) of this section, NMFS will determine the extent of the DAM zone as follows:

(A) A larger circular zone will be drawn to extend 15 nm (27.8 km) from the perimeter of a circle around each core area.

(B) The DAM zone will then be defined by a polygon drawn outside but tangential to the circular buffer zone(s). The latitudinal and longitudinal coordinates of the corners of the polygon will then be identified.

(iii) *Requirements and prohibitions within DAM zones.* Notice of specific area restrictions will be published in the **Federal Register** and will become effective 2 days after publication. Gear not in compliance with the imposed restrictions may not be set in the DAM zone after the effective date. NMFS may either:

(A) require owners of gillnet and lobster gear set within the DAM zone to remove all such gear within 2 days after notice is published in the **Federal Register**, or

(B) allow fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement to right whales. Acceptable fishing practices and gear modifications would be identified in the **Federal Register** notification implementing the DAM zone.

(C) The determination of whether restrictions will be imposed within a DAM zone would be based on NMFS' review of a variety of 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.

(iv) *Restricted period.* Any DAM zone will remain in effect for a minimum period of 15 days. At the conclusion of the 15-day period, the DAM zone will expire automatically unless it is extended by subsequent publication in the **Federal Register**.

(v) *Extensions of the restricted period.* Any 15-day period may be extended if NMFS determines that the trigger established in paragraph (g)(3)(i) of this section continues to be met.

(vi) *Reopening of restricted zone.* NMFS may remove any gear restriction or prohibition and reopen the DAM zone prior to its automatic expiration if there are no confirmed sightings of right whales for at least 1 week, or other credible evidence indicates that right whales have left the DAM zone. NMFS will notify the public of the reopening of a DAM zone prior to the expiration of the 15-day period by issuing a document in the **Federal Register** and through other appropriate media.

[FR Doc. 02-272 Filed 1-8-02; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 011120279-1311-02; I.D. 092401E]

RIN 0648-AP68

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

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

ACTION: Interim final rule.

SUMMARY: NMFS is issuing an interim final rule to amend the regulations that implement the Atlantic Large Whale Take Reduction Plan (ALWTRP) to provide further protection for large whales, with an emphasis on North Atlantic right whales, through a

Seasonal Area Management (SAM) program. The SAM program defines two areas based on the annual predictable presence of North Atlantic right whales in which gear restrictions for lobster trap and anchored gillnet gear will be required. This action is necessary due to the critical status of the North Atlantic right whale population. The intent of this action is to reduce interactions between North Atlantic right whales and fishing gear and to reduce serious injury and mortality of North Atlantic right whales due to entanglement in fishing gear.

DATES: Effective March 1, 2002.

Comments on this interim final rule must be postmarked or transmitted via facsimile by 5 p.m. Eastern Standard Time, on February 8, 2002. Comments transmitted via e-mail will not be accepted.

ADDRESSES: Send comments on this interim final rule to the Chief, Protected Resources Division, NMFS, 1 Blackburn Drive, Gloucester, MA 01930-2298. Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries and progress reports on implementation of the ALWTRP may be obtained by writing to Gregg LaMontagne, NMFS/Northeast Region, 1 Blackburn Dr., Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Gregg LaMontagne, NMFS, Northeast Region, 978-281-9291 or Patricia Lawson, NMFS, Office of Protected Resources, 301-713-2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for this proposed rule and the take reduction planning process can be downloaded from the ALWTRP Web site at <http://www.nero.nmfs.gov/whaletrp/>. Copies of the most recent marine mammal Stock Assessment Reports may be obtained by writing to Richard Merrick, NMFS, 166 Water St., Woods Hole, MA 02543 or can be downloaded from the Internet at http://www.nmfs.noaa.gov/prot_res/mammals/sa_rep/sar.html. Information on disentanglement events is available on the web page of NMFS' whale disentanglement contractor, the Center for Coastal Studies, <http://www.coastalstudies.org/>.

Background

This interim final rule implements modifications to the ALWTRP as

deemed necessary by NMFS to satisfy requirements of the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). On June 14, 2001, NMFS issued four Biological Opinions (BOs) as the result of ESA section 7 consultations on the three Fishery Management Plans (FMP) for the monkfish, spiny dogfish, and Northeast multispecies fisheries, and the Federal regulations for the American lobster fishery. The BOs concluded that the fisheries conducted pursuant to the three FMPs and the lobster regulations are likely to jeopardize the continued existence of right whales. In response to the section 7 consultation's jeopardizing finding, NMFS developed a Reasonable and Prudent Alternative (RPA) with multiple management components. As part of its RPA, NMFS developed gear restrictions for the anchored gillnet and lobster trap fisheries based on predictable annual concentrations of right whales. Details concerning the justification for and development of the SAM program and the implementing regulations were also provided in the preamble to the proposed rule (66 FR 59394, November 28, 2001) and are not repeated here.

Approved Measures

SAM Areas

The SAM program is established to protect predictable annual congregations of North Atlantic right whales in the waters off Cape Cod and out to the Exclusive Economic Zone line (see figure 1) as observed in aerial surveys from 1999-2001 (Merrick, et al. 2001). NMFS has defined two areas, called SAM West and SAM East, in which gear restrictions for lobster trap and anchored gillnet gear are required. These requirements are more stringent than, and in addition to, the gear modifications currently required under the ALWTRP for the Offshore Lobster Waters, Northern Nearshore Lobster Waters, Northern Inshore Lobster Waters and Other Northeast Waters (gillnet area description). SAM West and SAM East will occur on an annual basis for the period March 1 through April 30 and May 1 through July 31, respectively. The dividing line between SAM West and SAM East is at the 69° 24' W. longitude line. See table 1 for the spatial and temporal definitions of the areas.