DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 0011283341232–02; 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: Proposed rule; request for comments.

SUMMARY: NMFS proposes 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 and gillnet fishing gear within defined areas to protect North Atlantic right whales, and to establish criteria and procedures for implementing such restrictions north of 40° N. latitude, in order to further reduce risk of entanglement of right whales by such gear.

DATES: Comments on the proposed rule must be received by 5 p.m. EST on November 1, 2001.

ADDRESSES: Send comments on this proposed rule to the Assistant Regional Administrator for Protected Resources, Protected Resources Division, NMFS, Northeast Region, 1 Blackburn Dr., Gloucester, MA 01930. Comments will not be accepted if sent via e-mail or Internet. Copies of the Environmental Assessment/Regulatory Impact Review for this action can be obtained from the ALWTRP website listed under the Electronic Access portion of this document. Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may be obtained by writing Gregg LaMontagne, NMFS, Northeast Region, 1 Blackburn Dr., Gloucester, MA 01930 or Katherine Wang, NMFS, Southeast Region, 9721 Executive Center Dr., St.Petersburg, FL 33702–2432. For additional addresses and web sites for document availability see **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Gregg LaMontagne, NMFS, Northeast Region, 978–281–9291; 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 the ALWTRP 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.whoi.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 Gregg LaMontagne, NMFS, Northeast Region, 1 Blackburn Dr., Gloucester, MA 01930 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**).

The ALWTRP is a multi-faceted plan that includes area closures, gear requirements in areas open to fixed gear fishing, gear research to develop new modifications to current practices and/or fishing techniques, a right whale Sighting Advisory System, and a disentanglement program to free whales caught in fishing gear.

The ALWTRP (50 CFR 229.32) uses time/area closures to protect right whales in critical habitat areas. However, recent surveys have shown that right whales also aggregate outside of critical habitat areas, and outside of those areas otherwise periodically closed to fishing. To protect right whales found in concentrations outside of the existing critical habitat areas and areas periodically closed to certain fisheries, NMFS proposes to clarify and use its authority under 50 CFR § 229.32 to temporarily restrict the use of lobster traps and/or gillnet gear in areas where right whales aggregate.

NMFS re-convened the ALWTRT twice, once in April and once in May 2000, to develop the details of a Dynamic Area Management (DAM) process to temporarily require or remove restrictions in areas quickly due to the unexpected presence or absence of right whales. At these meetings, the ALWTRT discussed and developed several models for ''triggering'' a DAM zone based on whale density in a given area. However, the ALWTRT did not produce consensus recommendations on any one set of whale density criteria and/or triggering levels. It recommended that NMFS take into account ALWTRT discussions in developing this proposed rule.

This proposed rule would clarify NMFS' authority under § 229.32 to implement DAM zones, and establish criteria and procedures to implement them.

The Northeast Fisheries Science Center (NEFSC) analyzed historic sighting and survey data, considered the ALWTRT discussions, and developed criteria based on the analysis and discussions. NEFSC's findings are contained in a document entitled ''Defining Triggers for Temporary Area Closures to Protect Right Whales from Entanglements: Issues and Options'' (see **ADDRESSES** for copies). NMFS proposes to use the whale density threshold and other criteria described in the above mentioned paper to implement DAM zones under § 229.32.

A DAM zone would be triggered by a single reliable report from a qualified individual of 3 or more right whales within an area (75 nautical mils (nm^2) (139 km^2)) such that right whale density is equal to or greater than 0.04 right whales per nm2 (1.85 km^2). 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. Areas for consideration for DAM are limited to areas north of 40° N latitude, given animals south of this area have not been observed feeding or

otherwise grouped together for extended periods of time.

Analyses of historical sighting data indicate that this criterion, of at least 3 whales in an area with a density greater than or equal to 0.04 right whales per nm2 (1.85 km2), provides for a level of density where whales are likely to maintain residency in an area for at least 10 to 20 days. Residency indicates that whales may be actively feeding and, therefore, more vulnerable to entanglement. Operationally, NMFS would use the following procedures and criteria to establish a DAM zone:

1. A circle with a radius of at least 3 nm (5.6 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 km^2) is maintained. The length of the radius would be determined by taking the inverse of the 4 right whales per 100 nm2 (185.3 km^2) density, which is 24 nm2 (44.5 km^2) per whale. That figure is equivalent to a radial distance of 2.77 nm (5.13 km) rounded up to 3 nm (5.6 km) for a single right whale sighted (3.91 nm (7.25 km) rounded up to 4 nm (7.41 km) for two whales, 4.79 nm (8.88 km) rounded up to 5nm (9.27 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.

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 area in which the right whales could move and still be protected. Operationally, NMFS would determine the extent of the DAM zone as follows:

1. 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 is the geographic center of all sightings on the first day of an event.

2. The DAM zone would then be defined by latitude and longitude lines drawn outside but tangential to the circular buffer zone(s).

Once a DAM zone is identified, NMFS would 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. 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**. 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** notice. 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 notice in the **Federal Register** announcing the establishment of the zone with restrictions imposed. It will also announce them immediately upon filing the notice 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 would 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 would provide detailed information on the location of the DAM zone and the number of animals sighted within it. Furthermore, NMFS would request that fishermen voluntarily remove lobster trap and gillnet gear from a DAM zone and that no additional gear be set inside it.

NMFS proposes to 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 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 NMFS continues 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 would notify the public by issuing a notice in the **Federal Register** and through other appropriate media.

On May 9, 2001, NMFS used the criteria developed by the NEFSC to identify a restricted area for a group of 13 North Atlantic right whales in an area commonly called the Wilkinson Basin. This aggregation included several cow-calf pairs. A **Federal Register** notice restricting fishing for a 15-day period in the Wilkinson Basin area contained the following requirements:

1. Removal of all gillnet gear within 48 hours of publication of the notice in the **Federal Register**.

2. Removal of at least 50 percent of vertical lines from all lobster gear within 48 hours of publication of the notice in the **Federal Register**.

The May 2001 closure was an important step toward responding quickly to the presence of right whales in areas where gillnet and lobster gear may present significant entanglement risks. However, NMFS received public comments from fishermen, conservationists, and state managers regarding the DAM closure in the Wilkinson Basin and the efficacy of DAM in general. For example, representatives from the lobster fishery were concerned that, as implemented, the DAM restrictions did not give them enough time to remove their gear from the water and that the DAM zone covered too vast an area. NMFS will publish a notice in the **Federal Register** establishing the zone and restrictions imposed and will announce them immediately upon filing the notice with the office of the Federal Register, which is generally 3 to 5 days before publication in the **Federal Register**.

In addition, conservation groups indicated that the requirement to remove 50-percent of vertical lines in lobster gear presented significant enforcement problems. We agree that enforcement of a 50 percent removal of vertical lines from lobster gear would be difficult and, furthermore, do not believe that it would sufficiently reduce the risk to right whales and have therefore proposed a complete removal of all lobster gear in DAM zones. Finally, some state managers desired more clarification regarding the role of the states when a DAM closure is triggered. The states were also interested in determining whether a Federal DAM mechanism would preempt a state initiated response to unusual or unexpected sightings of right whales within state waters. A Federal DAM would preempt a state initiated response to unusual or unexpected sightings of right whales within state waters unless the state response was equally or more protective than the Federal DAM. Based on the scope of the responses received, NMFS has decided to issue this proposed rule to clarify its authority to implement future DAM closures, and to establish criteria and procedures for implementing DAM zones.

It is important to note that the agency is also in the process of developing proposed rules to implement Seasonal Area Management (SAM) and gear modifications to the ALWTRP for lobster trap gear in the offshore lobster waters, southern nearshore lobster waters and changes to the lobster and gillnet take reduction technology lists. Under SAM, restrictions would be placed in areas more predictably used by right whales on a seasonal basis. NMFS believes that implementation of SAM would reduce the need for use of DAM restricted zones to respond to observed concentrations of right whales.

Classification

NMFS prepared the following initial regulatory flexibility analysis that describes the economic impact for this proposed rule, which if adopted, would have on small entities:

This proposed rule would establish criteria and procedures to temporarily restrict fishing gear within defined areas on an expedited basis to protect concentrations of North Atlantic right whales. The objective of this proposed rule, issued pursuant to authority in section 118 of the MMPA, 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. 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. 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 the proposed 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. This proposed rule contains no reporting, recordkeeping, or other compliance requirements. There are no relevant Federal rules that duplicate, overlap, or conflict with the proposed rule.

Five alternatives were evaluated including a status quo or ''no action'' alternative, the proposed action, and three other alternatives. The No Action alternative would leave in place the existing regulations promulgated under the ALWTRP, but would not clarify NMFS' authority to implement DAM zones and would not identify criteria and procedures to implement them. The existing regulations already state that the Assistant Administrator (AA) may revise the existing regulations through notice in the **Federal Register** in order to close areas, open areas, and change boundaries of a closed area, or for a similar purpose (section 229.32(g)(2)). It is difficult to quantify the economic impacts of NMFS discretion in using § 229.32(g)(2) to implement DAM zones since the trigger used, restricted zone and restrictions implemented are all unknown at this time in addition to the unknowns of the particular event such as the time and location of the restriction and the level of fishing effort at that time and location.

The proposed action (PA) is to amend the regulations implementing the ALWTRP to clarify authority for implementing DAM zones, and to establish criteria and procedures to temporarily restrict fishing gear within defined areas on an expedited basis to protect concentrations of North Atlantic right whales. The analysis showed 210 lobster vessels fishing in the hypothetical DAM Area 1 in April and May, 2000. The total industry cost of removing the gear was estimated at $342K and the cost per vessel ranges between $328 and $3,011 with an average of $1,600. The economic analysis of DAM Area 1 determined 42 gillnet vessels were fishing in DAM Area 1 between April 1 and May 31, 2000, according to the Vessel Trip Reporting data. The total industry cost to remove sink gillnet gear would have been $7,081, with a cost per vessel of $170.

The third alternative considered having different triggers within each respective state jurisdiction as discussed by the ALWTRT. The State of Maine proposed the use of a trigger of 8 right whales in a 7.5 nm2 (13.9 km^2) area on two consecutive observations that would result in a core area of 7.5 nm2 (13.9 km^2). The Commonwealth of Massachusetts proposed the use of a trigger of 5 right whales in a 15 nm2 (27.8 km^2) area based on two sightings. The State of Rhode Island proposed the use of a trigger of 8 whales. Under Maine's proposal there would have been no closures based on sightings data from 2000. Under Massachusetts' proposal, there would have been one closure based on sightings data from 2000. The total cost of closing this one area in 2000 to the lobster fleet would have been $16.3K. Total industry costs to the sink gillnet fleet for closing one area in 2000 would have been $13.7K.

The fourth alternative would trigger a DAM zone using the observation of one right whale on a single day. In addition, a buffer of 15 NM (27.8 km) would be drawn around each individual animal observed. The economic analysis of 2000 sightings data indicates that 17 right whales would not be protected by the six closures under the PA plan. Total industry costs of the lobster fleet would be $3.5M. This includes $0.3M for the 17 right whales not protected under the PA plan, plus $3.2M for the PA plan. Total industry costs of the sink gillnet fleet would be $2.9M. This includes $0.23M for the 17 right whales not protected under the PA plan, plus $2.68M for the PA plan.

Under the fifth alternative, the trigger and buffer would be the same as in the proposed action (i.e., the observation of 4 right whales in a 100 nm2 (185.3 km2) area and the buffer would be 15 nm [27.8 km]), 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 proposed action, which requires complete removal. Based on right whale sightings data in 2000, six areas could potentially be closed (Clapham and Pace, 2000). Total industry cost to remove one buoy line from six potential closures in 2000 is $0.2M. Area costs range from a high of $49.7K in DAM Area 1 to $24.3K in DAM Area 6. Based on the home port analysis of DAM Area 1, the average cost to remove one buoy line is $237 per vessel. The total industry cost for sink gillnet vessels is the same as in the PA plan.

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

On June 14, 2001, under the Endangered Species Act (ESA), NMFS issued four Biological Opinions (BiOps) as the result of ESA section 7 consultations on the three Fishery Management Plans (FMP) for the monkfish, spiny dogfish, and multispecies fisheries, and the Federal regulations for the lobster fishery. Pursuant to the consultation's finding that the FMPs and lobster regulations were likely to jeopardize the continued existence of right whales, NMFS defined a Reasonable and Prudent Alternative (RPA) with multiple management components to the proposed action. Among the RPA elements was a mechanism for the expedited closure of areas outside designated right whale critical habitat, which NMFS has termed Dynamic Area Management (DAM). The BiOps require NMFS to approve a rule

proposing criteria and procedures for implementing DAM by September 30, 2001.

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: September 26, 2001.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

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 to read as follows:

§ 229.2 Definitions.

* * * * *

Qualified individual means an individual ascertained by NMFS to be reasonably able, though 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.

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

§ 229.32 Atlantic large whale take reduction plan regulations.

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(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 3 nm (5.6 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 a group of 3 or more right whales as candidates for protection, NMFS will define the core zone by the latitude and longitude lines tangential to the circular buffer zones drawn with a 15-nm (27.8 km) radius around the event epicenter of each core area identified in paragraph (g)(3)(i) of this section. The event epicenter is the geographic center of all sightings on the first day of an event, or sighting.

(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** notice 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 notice in the **Federal Register** and through other appropriate media.

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