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(2) Rule 101, "Title," and Rule 102, "Definition of Terms," originally adopted on February 4, 1977 and amended on May 17, 2005.

(3) Rule 106, "Increments of Progress," Rule 210, "Applications," Rule 212, "Standards for Approving Permits," and Rule 218, "Stack Monitoring," originally adopted on January 9, 1976 and amended on May 17, 2005.

(4) Rule 108, "Alternative Emission Control Plans," Rule 109, "Recordkeeping for Volatile Organic Compound Emissions," Rule 208, "Permit for Open Burning," Rule 220, "Exemption—Net Increase in Emissions," Rule 221, "Plans," and Rule 226, "Limitations on Potential to Emit," originally adopted on March 2, 1990, May 5, 1989, October 8, 1976, November 4, 1977, January 4, 1985, and March 17, 1998, respectively, and amended on May 17, 2005.

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## GENERAL SERVICES ADMINISTRATION

### 41 CFR Part 302–17

[FTR Amendment 2008–03; FTR Case 2008–302; Docket2008–002, Sequence 1]

RIN 3090–AI48

### Federal Travel Regulation; Relocation Income Tax (RIT) Allowance TaxTables–2008 Update

#### Correction

In rule document E8–10022 beginning on page 25539 in the issue of Wednesday, May 7, 2008 make the following corrections:

On page 25542, in Part 302–17, under Appendix D to Part 302–17, the tables should read as set forth below:

## Appendix D to Part 302–17— [Corrected]

### PUERTO RICO MARGINAL TAX RATES BY EARNED INCOME LEVEL—TAX YEAR2007

[Use the following table to compute the RIT allowance for Puerto Ricotaxes, as prescribed in 302–17.8(e)(4)(i), on taxable reimbursements received during calendar year 2007.]

Marginal tax rate	For married person living with spouse and filing jointly, married person not living with spouse, single person, or head of household	
Percent	Over	But not over
7% .....	\$2,000	\$17,000
14% + 1,190	17,000	30,000
25% + 3,010	30,000	50,000
33% + 8,010	50,000	.....

Marginal tax rate	For married person living with spouse and filing separately	
Percent	Over	But not over
7% .....	\$1,000	\$8,500
14% + \$595 ..	8,500	15,000
25% + 1,505	15,000	25,000
33% + 4,005	25,000	.....

Source: Individual Income Tax Return 2007—Long Form; Commonwealth of Puerto Rico, Department of the Treasury, P.O. Box 9022501, San Juan, PR 00902–2501; <http://www.hacienda.gobierno.pr/>.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 080509647–81084–02]

RIN 0648–AW84

### 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:** Through this final rule, the National Marine Fisheries Service (NMFS) amends the regulations implementing the Atlantic Large Whale Take Reduction Plan (ALWTRP), to delay the effective date of a broad-based gear modification and remove one of the gear-related definitions required in the

recent amendment to the ALWTRP. Specifically, NMFS will delay the broad-based sinking groundline requirement for trap/pot fishermen along the Atlantic coast for an additional six months, from October 5, 2008, to April 5, 2009. Additionally, this final rule will delete the term "neutrally buoyant line" and its associated definition from the ALWTRP regulations.

**DATES:** This final rule is effective October 2, 2008.

**ADDRESSES:** Copies of the proposed rule and Regulatory Impact Review related to this action can be obtained from the ALWTRP website listed under the Electronic Access portion of this document or writing Diane Borggaard, NMFS, Northeast Region, 1 Blackburn Dr., Gloucester, MA 01930. For additional ADDRESSES and web sites for document availability see

#### SUPPLEMENTARY INFORMATION.

#### FOR FURTHER INFORMATION CONTACT:

Diane Borggaard, NMFS, Northeast Region, 978–281–9300 Ext. 6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

#### SUPPLEMENTARY INFORMATION:

#### Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at <http://www.nero.noaa.gov/whaletrp/>. The complete text of the regulations implementing the ALWTRP can be found either in the Code of Federal Regulations (CFR) at 50 CFR 229.32 or downloaded from the website, along with a guide to the regulations.

#### Background

This final rule implements modifications to the October 5, 2007 amendment to the ALWTRP (72 FR 57104, October 5, 2007; 73 FR 19171, April 9, 2008). Details concerning the development and justification of this final rule were provided in the preamble of the proposed rule (73 FR 32278, June 6, 2008), and are not repeated here.

#### Delay of Broad-based Sinking Groundline Requirement for Atlantic Trap/Pot Fishermen

This final rule will provide an additional six months (through April 5, 2009) for trap/pot fishermen along the Atlantic coast to comply with the ALWTRP's broad-based sinking groundline requirement. Regulated trap/pot fisheries include, but are not limited to, American lobster, crab (red, Jonah, rock, and blue), hagfish, finfish (black sea bass, scup, tautog, cod, haddock,

pollock, redfish (ocean perch), and white hake), conch/whelk, and shrimp. All other ALWTRP amendments will remain in effect, including the sinking groundline requirement for trap/pot fishermen in Cape Cod Bay Restricted Area (January 1 - April 15) and all AWLTRP-regulated gillnet fisheries.

*Deletion of the Term "Neutrally Buoyant Line" and its Associated Definition*

Under this final rule, the term "neutrally buoyant line" and its definition will be deleted from the ALWTRP regulations, so that only the "sinking line" term and definition will remain. In order to ensure clarity, the term will be removed for both buoy line and groundline requirements and for both gillnet and trap/pot fisheries. Accordingly, the "sinking line" definition will be modified to eliminate reference to "see also neutrally buoyant line."

*Comments on the Notice of Proposed Rulemaking and Responses*

NMFS issued a proposed rule on June 6, 2008 (73 FR 32278) with a 30-day comment period through July 7, 2008. NMFS received approximately 251 letters on the proposed rule via letter, fax, or email. Additionally, NMFS received approximately 2,950 form letters and/or signatures on the proposed rule. Of the 2,950 form letters, 2,840 copies were received via [www.regulations.gov](http://www.regulations.gov), 50 copies were a second type of form letter, and 60 copies were received from a third type of form letter. All comments were reviewed by NMFS and included issues regarding the proposed delay, NMFS' mandates, and the proposed removal of the term "neutrally buoyant line" and its associated definition from ALWTRP regulations. Comments outside the scope of the proposed action are not responded to here. However, many of these comments (e.g., regarding problems with the use of sinking groundline, ship strike mitigation) were addressed in the responses to comments on the recent ALWTRP final rule (72 FR 57104, October 5, 2007) and Final Environmental Impact Statement (FEIS) (NMFS 2007) and are not repeated here. Comments related to reducing risk associated with vertical line are also outside the scope of this action but will be provided to the Atlantic Large Whale Take Reduction Team (ALWTRT) for consideration at its next meeting. The comments related to the proposed rule are summarized below, and NMFS' response follows each comment.

*Comments on the Delay*

*Comment 1:* Many commenters expressed their support for the proposed six month extension (through April 5, 2009). Commenters noted that the current implementation deadline falls during the most profitable fishing period, and requiring lobstermen to remove and reconfigure gear at this time would cause a substantial loss in financial revenue (to them and their surrounding communities), whereas an extension would allow them to fish uninterrupted and maximize profitability during the height of the lobster harvesting season. Commenters stated that converting to sinking line is time-consuming and expensive, especially during prime fishing months and believed that gear should be converted gradually during the winter off-season, which would provide a more sensible, and physically and financially easier transition. Other commenters felt that the weather is too unpredictable during October and the wind and sea conditions would be too dangerous [for gear conversion]. One commenter stated that fishermen simply need more time to comply and a delay in implementation would allow them to better prepare for the final rule.

*Response:* NMFS agrees that the six month extension will facilitate the conversion to sinking groundline in trap/pot fisheries along the Atlantic. As stated in the Regulatory Impact Review (RIR; May 2008) for this action, providing additional time for gear conversion would reduce the possibility of a disruption in fishing effort during the summer and early fall of 2008, which would have an adverse impact on the catch and revenues of affected fishermen. Fishermen would be able to bring their gear into compliance during the winter, when fishing activity slows, fewer traps are in the water, and fishermen typically focus on gear repair and replacement.

*Comment 2:* Many commenters expressed their support for the proposed six month extension (through April 5, 2009) so that fishermen could adjust to current economic conditions (i.e., higher fuel and bait prices, lower purchase prices for lobster) and gain more financial resources to offset the difficulties many are having with purchasing sinking line. Several commenters also believed that the proposed delay is economically imperative for local communities. One commenter noted that the proposed action would allow lobstermen to spread out the cost of purchasing sinking line. Another commenter stated that for those that fish year-round, the

extension will allot time to comply without missing fishing days. Other commenters expressed hope that the Federal government will come forth to assist with the expenses endured by each lobsterman affected by the sinking line requirement.

*Response:* NMFS agrees that the delay will assist all Atlantic trap/pot fishermen in fully converting to sinking groundline. Again, as noted in the RIR, trap/pot fishermen would be able to convert their gear over an extended period of time to avoid any potential spike in demand for sinking line, which if it materialized, might temporarily outstrip the capacity of cordage manufacturers, drive up prices, and impair fishermen's ability to comply. This action would also reduce compliance costs for those who have yet to complete the conversion, since more line could be converted when it ordinarily would need to be replaced, avoiding the costs associated with accelerating gear replacement.

*Comment 3:* Many commenters expressed their support for the proposed six month extension (through April 5, 2009) as lobstermen would be able to research and experiment with different types of sinking line to determine what works best (i.e., on hard bottoms) as well as learn how to effectively fish with sinking line to reduce gear loss and safety concerns. One commenter believed that the proposed delay would demonstrate that NMFS understands the practical challenges of the large-scale transition to sinking groundlines.

*Response:* NMFS appreciates fishermen's efforts to continue to phase-in sinking groundline during the delay. NMFS recognizes that the conversion from floating to sinking groundline involves a major reconfiguration of gear involving time and resources.

*Comment 4:* Several commenters noted that providing a 6-month delay in implementation would allow lobstermen to avoid the necessity to switch to fishing singles, which would increase the number of vertical lines in the water, and hence, pose a greater risk to whales.

*Response:* NMFS agrees that the delay will assist all Atlantic trap/pot fishermen in fully converting to sinking groundline. NMFS also recognizes vertical lines as an entanglement risk to large whales and will be continuing to discuss this subject with the ALWTRT.

*Comment 5:* One commenter supported the proposed delay in implementation until April 2009, for Federal waters only.

*Response:* Based on NMFS' monitoring of both the availability of sinking groundline and the progress of

the fishing industry in converting to sinking groundline, NMFS believes an additional six months (to April 5, 2009) for trap/pot fishermen along the Atlantic coast to comply with this requirement is warranted.

*Comment 6:* One commenter noted that the original 12-month implementation period was not enough time to convert all floating groundlines as lobstermen typically only replace a portion of their groundline annually. The commenter also stated that there was a short supply for industry members who wished to purchase compliant gear before the 2008 season and a lack of assurance the line purchased would be compliant under the regulations. Another commenter noted that the marine supplier he coordinates with ran out of steel liner sinking line in April 2008. Several other commenters questioned the availability of sinking line and believed a 6-month delay in implementation would enable rope producers time to increase production and meet industry demands. Some of these commenters believed there would be difficulties with enforcement of the regulation if not enough sinking line had been produced for fishermen to complete the required conversion.

*Response:* NMFS recognizes that the conversion from floating to sinking groundline would expedite a fisherman's routine schedule of line replacement. Based on reasons noted in the proposed rule (73 FR 32278, June 6, 2008) and RIR (May 2008), and comments received, NMFS believes an additional six months for Atlantic trap/pot fishermen to convert to sinking groundline is warranted. NMFS believes that an eighteen month time period (i.e., from the time the final rule was finalized on October 5, 2007, to the new effective date of April 5, 2009) is sufficient time for the Atlantic trap/pot fishery to make the conversion. Manufacturers have indicated to NMFS that an adequate supply of cordage would be available if fishermen continue to convert throughout this time period.

*Comment 7:* Many commenters supported the proposed 6-month delay in implementation as NMFS would have more time to continue working with fishermen to address ongoing issues of implementation and enforcement. One commenter felt that the proposed extension would allow industry to suggest another rule that will cause less financial hardship to fishermen. Other commenters noted that the proposed rule will give the Maine Lobstermen's Association (MLA) and other groups more time to work out a "conservation

equivalency agreement" to meet the goals of the ALWTRT while ensuring Maine lobstermen the ability to fish. One commenter maintained that the proposed delay would allow NMFS and the ALWTRT time to consider the State of Maine's proposed sink rope exemption for Downeast Maine. A different commenter noted that NMFS, MLA, and Maine Department of Marine Resources (DMR) have been actively engaged in discussions about modifications to the regulations that would allow floating groundline to be used in some additional areas where there is low risk to whales in return for a reduction in endlines; the commenter encouraged NMFS to continue to work with MLA and Maine DMR and use the additional 6 months to craft a compromise on this issue.

*Response:* NMFS believes an additional six months for Atlantic trap/pot fishermen to convert to sinking groundline is appropriate to ensure implementation of this gear modification. However, NMFS does not agree that there is an enforcement concern regarding sinking groundline. The recent ALWTRP final rule (72 FR 57104, October 5, 2007) included modifications to the sinking groundline definition, as well as prohibitions on attaching buoy, toggles or other floatation devices, to assist enforcement of these provisions. Additionally, although it is not NOAA Office of Law Enforcement policy to share enforcement procedures with the public, NOAA is prepared to enforce this requirement. NOAA Office of Law Enforcement relies on its partnership with the U.S. Coast Guard (USCG) and state agencies to monitor compliance with the ALWTRP. NMFS has been in discussions with the Maine DMR on ALWTRP enforcement efforts.

Although the ALWTRT has been discussing possible proposals related to exemptions to the sinking groundline requirement (in exchange for significant reductions in vertical lines) in specific areas these have not yet received even conceptual support by the ALWTRT. If conceptual support were achieved, significant work would remain to develop and agree to details of such a proposal. Any associated modification to the ALWTRP, pending approval, would be conducted through a separate rulemaking action. Thus, those discussions occurring with the ALWTRT are on a separate track and are independent of this action.

*Comment 8:* Several commenters requested the delay be extended to a date later than April 5, 2009. Many of these commenters noted that they fish offshore trawls year-round, and the

current proposed delay in implementation would not provide the necessary time for their gear to be converted. Commenters felt that the proposed April 5, 2009, deadline was chosen without consideration for the offshore fleet and the time necessary to convert offshore gear, leaving the proposed rule to serve only one segment of the industry. They believed that a delay until at least December 31, 2009, is necessary for offshore gear due to: (1) the cost of converting offshore gear and the fact that due to current economic conditions fishermen do not have extra money to convert their gear; (2) the time it takes to reconfigure offshore gear (vessels are able to transport no more than two trawls out to the fishing grounds at any one time); (3) the unnecessary safety risks that will be posed to offshore crews if they need to take out more than one trawl at a time during the winter months; (4) the large amount of heavy-duty line required by the offshore fleet, and if that supply will be available; and (5) the necessity of a comprehensive rope recycling program. Many commenters also noted the necessity for Federal funding or the establishment of a financial program to assist them in complying with the sinking groundline regulation. One commenter felt that if financial assistance could not be offered, then the delay should be extended to December 31, 2010.

*Response:* NMFS did consider the Atlantic trap/pot fishery in its entirety when considering whether a delay in the conversion to sinking groundline was warranted. Additionally, NMFS considered other factors as noted in the proposed rule and RIR, such as impacts to large whales, when considering the appropriate delay period. NMFS believes that the additional six months, which would result in a total of 18 months (since the October 5, 2007, final rule) is an adequate time period to convert to sinking groundline for the offshore fleet taking into consideration the points noted above. For example, transporting two trawls a trip over an 18 month period should be adequate time to convert. NMFS has been in touch with gear manufacturers and suppliers who note that there should be a supply of sinking line available if fishermen continue to phase-in sinking groundline during the delay. Additionally, NMFS encourages fishermen to contact the NMFS Gear Research Team (contact information found at <http://www.nero.noaa.gov/whaletrp/plan/gear/index.html>) for information or contacts related to recycling line.

As noted in the preambles to the proposed and final rule, NMFS believes

the six month delay through April 5, 2009, is appropriate and that any further broad-based delay could increase risk based on the seasonal abundance and distribution of large whales along the east coast. Specifically, the highest frequency of right whales in the western Gulf of Maine is April through May whereby at least half of the known population may be seen in this area during that time. Similarly, the highest frequency of right whales generally occurs in the Northern Edge of Georges Bank during June and July (Pace RM III, Merrick RL, 2008. Northwest Atlantic Ocean Habitats Important to the Conservation of North Atlantic Right Whales (*Eubalaena glacialis*). Therefore, NMFS believes that any delay beyond April 5, 2009 would create an increased risk to right whales in the Northeast.

**Comment 9:** Many commenters stated confusion and concern as to how to identify sinking line that complies with NMFS' 1.03 or greater specific gravity standard. They questioned how fishermen can be certain the product they are buying as "sink rope" meets the standard set by NMFS. One commenter stated that many lobstermen were unable to change their gear prior to the start of the 2007 fishing year because they did not know what kinds of rope would be deemed sufficient to meet AWLTRP final rule requirements. Other commenters were worried that money already spent on available sinking line may have been wasted, as no one will verify if the line they purchased is compliant or not. Commenters noted that the rope industry does not clearly label its line in a manner to indicate the specific gravity of the line and/or if it is compliant with AWLTRP regulations. Some commenters requested NMFS to provide a clear directive indicating which line(s) comply with the rule; one commenter believed that providing a longer implementation time will enable the Agency to develop clearer standards to determine whether rope will or will not meet the regulation requirements. A different commenter requested a government proven line that has been approved for the specific buoyancy levels.

**Response:** NMFS believes that the elimination of the "neutrally buoyant line" term and definition in the ALWTRP regulations will facilitate fishermen understanding the "sinking" groundline regulations. For example, industry has wondered whether NMFS will permit the use of "low profile" groundline in certain areas (the term "low profile" refers to line that does not sink, but would remain in the water column relatively close to the sea floor). Elimination of references to "neutrally

buoyant line" from the regulations would make clear to fishermen that "sinking" groundline is required. In response to requests from the fishing industry and line manufacturers for a clearer definition of sinking line, NMFS developed criteria for establishing a density standard for sinking line and used this criteria to develop the sinking line definition. In addition, NMFS finalized a procedure for assessing the specific gravity of line, which NMFS will use to determine whether a manufactured line meets the accepted density standard. The criteria are available on NMFS' website at <http://www.nero.noaa.gov/nero/hotnews/whalesfr/>. These criteria and procedures were meant to facilitate the manufacture of sinking line. Manufacturers have assured NMFS that they can produce rope that meets the definition of sinking line as mandated by the ALWTRP. Fishermen are required to ensure the line they purchase for their groundline is sinking line, and NMFS encourages fishermen to talk with gear suppliers and/or manufacturers about the available options for line that meets the sinking line requirements. However, NMFS does not expect fishermen to conduct their own specific gravity analyses. Additionally, NMFS does not believe special markings are needed for sinking line as NMFS is confident that fishermen have the ability to easily and confidently purchase sinking line that meets the requirements of the ALWTRP.

**Comment 10:** One commenter stated that lobstermen have not received any information or assistance as to which lines will perform best for their local conditions and they are hesitant to invest in a line that may not work.

**Response:** NMFS has funded research with the states, manufacturers, and industry to address this issue. NMFS' Gear Research Team has worked with numerous fishermen along the Atlantic coast over the years to test sinking line, and find a line that operationally works in their area. Thus, NMFS is aware of many fishermen who use sinking line and encourages industry members to contact the NMFS Gear Research Team (contact information found at <http://www.nero.noaa.gov/whaletrp/plan/gear/index.html>) for contact information of those who have used or tested sinking line in their area to discuss these issues further.

**Comment 11:** One commenter noted that at this time, Rhode Island lobstermen have not received any financial assistance to initiate a rope buyback program. The commenter stated that the state has two dozen vessels using floating line nearshore due to rocky bottom, and that the State is

home to the largest offshore lobster fleet, all of which use floating line. Although many fishermen have started to convert, others say they simply can not afford to buy the required line.

**Response:** NMFS believes that the delay will provide more time to enable those fishermen who have not had access to these buyback programs to find the resources to convert to sinking groundline.

**Comment 12:** One commenter felt that current rope buyback programs were occurring at the wrong times of the year, requiring fishermen to bring in their traps during peak fishing periods in order to make an exchange. The commenter suggested the months of January and February for a rope buyback program, as that is when the gear is out of the water.

**Response:** The buyback program in Maine (where this commenter originates) is administered as part of a NOAA Grant. Therefore, we will forward the comment to the grant recipient for consideration.

**Comment 13:** One commenter provided several remarks on the rope manufacturing industry. The commenter noted a rapid increase in the demand for sinking line from the Northeast U.S., roughly concurrent with the implementation of various rules and buyback programs. Although, to date, customer needs have been satisfied (though typical delivery times have been longer than normal) the commenter stated that significant challenges do exist to meet the current demand for sinking line. The commenter maintained that manufacturers are unable to control the sourcing of polyester used in constructing sinking line, as the material is used in other industries and is not always available at a reasonable price. The commenter also stated that rope manufacturers serve a variety of industries and the level of demand from markets outside fisheries may impact the ability of manufacturers to supply product within a reasonable time frame, especially if those outside industries are seasonal. The commenter believed that a sudden surge in demand would result in a temporary shortage and higher prices, and any price change would work quickly through the supply chain, potentially impacting individuals in a manner that would cause difficulties in complying with sinking groundline regulations.

**Response:** NMFS appreciates the comment. As noted in the RIR, those fishermen who have not completed the conversion to sinking groundline are being provided an additional six months, which would help to smooth

any potential spike in demand for sinking line that might temporarily outstrip the capacity of cordage manufacturers, drive up prices, and impair fishermen's ability to comply. Therefore, for this reason and others noted in the proposed rule and RIR, NMFS believes that the delay will allow industry enough time to fully convert and enable manufacturer's to meet the demand for sinking line during this time period. NMFS also encourages fishermen to continue the conversion to sinking line as soon as possible to avoid possible problems described by the commenter.

*Comment 14:* One commenter noted that a variety of products are required to best serve the industry as differing fishing environments and techniques require different designs of rope product. The commenter believed that since the fishing industry is now at a stage where a significant amount of compliant gear is being fished and a greater amount of feedback is expected over the next several months, manufacturers can use this information and make the necessary modifications to their product. The commenter felt that if a particular product is not available, it is conceivable that fishermen will be forced to use a product not well-suited for their needs in order to comply. Using such product could result in a significantly shortened product life-span, and as a result, increased costs and/or reduce a fisherman's ability to maximize landings.

*Response:* NMFS acknowledges that the type of sinking line a fishermen may choose is dependent on many factors (e.g., bottom type, tide). Additionally, NMFS understands that many fishermen have tested various types of sinking groundline in various environments to determine the best line for their operation. NMFS encourages fishermen to continue the conversion to sinking line as soon as possible to help ensure availability of their desired product to avoid possible problems described by the commenter.

*Comment 15:* Many commenters opposed the proposed six month extension (through April 5, 2009), stating that the rationale NMFS used to justify the proposed six-month delay in implementation was inadequate, disingenuous, unjustified, needed to be demonstrated factually, and is contrary to the protection needs of the North Atlantic right whale. Some commenters found the proposed delay to be unwarranted and risky. Commenters believed NMFS had already taken too long to adopt final regulations (a total of 5 years since the previous plan was found to be inadequate) and at least 18

right whale entanglements have been observed during those 5 years (commenters stated that at least 5-percent of the right whale population has been entangled in fishing gear in the time it took to develop the new rules). Commenters noted that NMFS has stated "the loss of even a single individual [right whale] may contribute to the extinction of the species", and hence, NMFS cannot casually delay the implementation of a measure necessary to avoid this result. Another commenter noted that past analyses (i.e., in the FEIS [NMFS 2007]) show that the sinking groundline requirement should be implemented by October 5, 2008, and it is inconsistent for NMFS to suggest further delay.

*Response:* Due to the magnitude of the time and resources needed by fishermen to change their gear to sinking and/or neutrally buoyant groundline required by the recent ALWTRP amendment, NMFS provided a one year phase-in period. However, since publication of the final rule, NMFS has monitored both the availability of sinking groundline and the progress of the fishing industry in converting to sinking groundline and determined that both the American lobster fishery and other trap/pot fisheries require additional time to convert to sinking groundline. NMFS believes fishermen will be continually converting their gear before the effective date, which will result in progressive risk-reduction to large whales. Additionally, all other ALWTRP requirements would remain in effect during this period. NMFS believes that this action will result in minimal risk to large whales (see responses to Comments 16 and 18 for additional information regarding the rationale).

*Comment 16:* Many commenters disagreed with NMFS and felt that the proposed delay in implementation would result in further adverse impacts to whales, especially right whales. One commenter felt that the assertions offered for why the delay will not have an impact on whales were wrong and the facts clearly state that whales are indeed put at significant risk by the delay. Commenters questioned how NMFS could substantiate any delay when according to the Maine DMR, at least 26 Dynamic Area Management (DAM) zones had been declared between October-April off the coast of Maine and New Hampshire since 2002. Commenters noted that managers will be left with fewer options to protect whales with the loss of the DAM and the Seasonal Area Management (SAM) Programs in April and October 2008, respectively. Commenters continued to state that NMFS justified the

elimination of these programs in the final rule because they would be replaced by the broad-based sinking groundline requirement. One commenter stated that NMFS is allowing risk reduction components of the ALWTRP to expire before other measures are in place to substitute for their loss. Another commenter pointed to the lack of Federal funding for disentanglement operations beginning in 2009. Without the means of either reducing the concentration of gear in the given area (i.e., a continuation of the SAM/DAM programs) or at least attempting to disentangle whales that potentially become entangled, commenters believed populations of North Atlantic large whale species would be placed at greater risk due to the delay. One commenter stated that neither this proposed rule nor its RIR elaborated on what the minimal impacts [to whales] are expected to be.

*Response:* NMFS has made a qualitative assessment that the impacts to large whales from the delay would be minimal based on the various reasons noted in the proposed rule and RIR. In summary, this is based on what NMFS knows about gear and whale distribution, coupled with the conversion to sinking groundline which has already occurred due to buyback programs and expansive special right whale management areas. It is important to reiterate that the DAM program expired on April 5, 2008, when most of the broad-based gear modifications were effective. NMFS believes that the numerous DAM zones that have been established in the Gulf of Maine since the program was implemented in 2002 have facilitated the conversion of lobster trap/pot gear to sinking groundline in these areas. NMFS also believes that the SAM program, the associated areas of which expanded on April 5, 2008, has similarly facilitated the conversion of lobster trap/pot gear to sinking groundline in these areas. However, NMFS acknowledges there has been confusion on the part of some industry, especially in areas that were not impacted by the DAM and SAM programs, as to who is impacted by the new regulations (e.g., on April 5, 2008, other trap/pot fisheries were subject to the ALWTRP including the SAM requirements) and what type of line is required for groundline (see Comment 9 for an example of this confusion). NMFS is not eliminating the broad-based sinking groundline requirement that was required through the October 5, 2007, final rule but is merely delaying the effective date of this by six months and is deleting the "neutrally buoyant"

line terminology to assist with compliance with these regulations. The majority of the conservation measures included in the October amendment to the ALWTRP are already in place, and NMFS believes that those fishermen who have not already converted will continue to convert throughout the delay.

Regarding the comment on disentanglement, NMFS recognizes the critical importance of removing fishing gear from entangled whales but is faced with decreasing budgets and implementing other pressing priorities. NMFS is seeking more cost-effective options to disentangle whales and to prevent entanglements from occurring.

*Comment 17:* Many commenters felt that the majority of conservation measures in the ALWTRP, which NMFS states will already be in place during the 6-month extension, are inadequate and insufficient to protect whales. Commenters stated that whales will be vulnerable to entanglement in trap/pot gear during the delay as the only protective measure in place would be weak links, which NMFS has already determined are inadequate for risk reduction on their own, and no alternative protections are currently proposed. Commenters noted the entanglement of right whale #3107, which died as result of an entanglement in fishing gear with an unbroken 600lb weak link. One commenter believed it is misleading to state that the majority of ALWTRP conservation measures are already in place. Another commenter stated that any reduction in weak link strength or additional requirements of gear anchoring systems should not be considered significantly protective. Several commenters felt that the groundline requirement was the only ALWTRP requirement that would significantly reduce the line in the water column and therefore the only measure with a probability of further reducing entanglement risks.

*Response:* NMFS disagrees and believes that large whales benefitted and continue to benefit from the numerous modifications to the ALWTRP that were effective April 5, 2008, as well as those that were previously in effect (e.g., restrictions in Cape Cod Bay and Great South Channel Restricted Areas). These modifications included but were not limited to expansion of the ALWTRP requirements in time and space, as well as numerous gear modifications. NMFS also believes that weak links add a level of protection for large whales, and in combination with other mitigation measures, serve as a valuable conservation tool. NMFS does not have evidence to suggest that weak links,

when designed and used properly, are ineffective (i.e., NMFS does not have a documented case where a weak link failed to work for the type of entanglement it was designed to address). The rationale for various ALWTRP gear modifications, such as weak link strengths and gear anchoring systems, has been included in previous rulemaking documents. However, the comment related to this is outside the scope of this action and NMFS encourages the commenter to contact the NMFS Gear Research Team (contact information found at <http://www.nero.noaa.gov/whaletrp/plan/gear/index.html>) for further information.

*Comment 18:* Some commenters contested NMFS' statement that "special right whale management areas have already converted to sinking groundline". One commenter stated that the special areas in this plan were already in place in a previous plan which was found to be inadequate, and the areas provide little assurance of protection beyond that which was provided in the previous plan. Another commenter noted that the report cited by NMFS (Pace and Merrick 2008) indicated that there are important areas for whales, considered potential high use areas (i.e., Jordan Basin in the spring) that may not be protected under the ALWTRP. Commenters again noted that the DAM program was eliminated in October 2007 in lieu of the October 5, 2008, sinking groundline measures inside and outside SAM areas. One commenter noted that until the sinking groundline requirement comes into effect, the amount of time and area in which sinking groundlines would be required would be less than that which was required under the October 2007 revised regulations. The commenter stated that the ALWTRP is intended for other large whales besides right whales, and many of these other endangered species do not stay within the "special management areas". These other species would get little benefit from gear conversion that is confined solely to these areas, whereas they would benefit from imposing regulations throughout the Northeast in October 2008. The commenter also noted that it is only fishermen who "typically operate" in these areas that may have converted their gear and other fishermen have the option of not setting their gear until these seasonal restrictions expire or to fish just outside the restricted areas; with the proposed delay, when the SAM program expires, the commenter believed these fishermen (who do not "typically operate" in the "special

management areas") may fish with unmodified gear in 2007–2008.

*Response:* The ALWTRP, and the associated right whale management areas, are not considered inadequate. Rather, NMFS determined that a broad-based management approach focusing on the times and areas where large whales (i.e., not just right whales) are likely to occur would be more protective than the DAM and SAM programs. NMFS believes that the combination of expansive special right whale management areas, in addition to buyback programs, have facilitated the conversion to sinking groundline.

One commenter stated that the Pace and Merrick (2008) document indicated that Jordan Basin is important to right whales in the spring, however, the document notes that this area is important August–October. Regardless, as NMFS has stated, the DAM program has facilitated conversion to sinking groundline. The DAM program was eliminated on April 5, 2008, and not October 2007 as indicated by one commenter. Additionally, the SAM areas were expanded in time and space in April 5, 2008, where sinking groundline was required for all affected gillnet and trap/pot fishermen (including those newly covered by the ALWTRP). The ALWTRP regulations are presently in effect in time and areas where right, humpback, and fin large whales are known to occur. Based on the expansive nature of the right whale restricted areas in the Gulf of Maine, these areas (and the associated sinking groundline restrictions) include many areas where humpback and fin whales have also been sighted. Additionally, once fishermen have invested significant time and costs into converting to sinking groundline, they are unlikely to re-invest additional resources to reconvert for a short six month window.

*Comment 19:* Many commenters disagreed with NMFS' assertion that "most trap/pot gear is out of the water during a portion of the time period before the broad-based sinking groundline requirements go into effect" [in April 2009]. One commenter felt there was no information provided to justify this statement and was not aware of any analyses evaluating when, where, or how much trap/pot gear is removed from the water between October and April, nor an evaluation as to whether the gear that is not removed is located in areas where right whales are likely to encounter it. One commenter felt that a reduction in fishing effort is not a viable reason to justify a delay in implementation, especially for right whales. Other commenters noted that

fixed gear fisheries operate year-round in all areas where there are seasonally abundant, large concentrations of right whales, in other areas along the East coast, including New England. One commenter noted that right whales are typically seen off North Carolina in March where sea bass and crab pot fisheries operate in North Carolina and South Carolina waters at this time. Commenters stated that whales, especially right whales, who roam out of their expected wintering grounds will have no protection. Another commenter noted that October, November, and December represent busy fishing months for Maine lobstermen and that the density of vertical lines and groundlines in the water at this time would put whales at risk.

*Response:* The statement that most Atlantic trap/pot gear is out of the water during a portion of the time period before the broad-based sinking groundline requirements go into effect (i.e., April 5, 2009) is based on historic fishing patterns along the east coast. When considering the Atlantic trap/pot fishery in its entirety, the majority of trap/pot effort occurs in the Northeast. However, the delay is occurring before the primary seasonal distribution of large whales in this area (although Cape Cod Bay is a special area for right whales, this area has already converted to sinking groundline during the critical periods) and buyback programs and special right whale management areas have facilitated the conversion to sinking groundline. When focusing on Maine alone, there is less concern that fishing effort may be high during some months of the delay given the consideration of whale distribution coupled with the conversion to sinking groundline that has occurred due to buyback programs and expansive DAM zones in the area. A NMFS analysis also indicates that estimated amounts of groundline and vertical line in Maine waters are at their lowest points during a number of months during the delay. Additionally, 71% of Maine state waters are exempt from the ALWTRP because these areas represent low entanglement risk to large whales. Regarding the mid and south Atlantic, the primary seasonal distribution of large whales occurs during the period of the delay, however, there is less trap/pot gear in the water (i.e., there is less density compared to the northeast) and a NMFS buyback program in this area has facilitated the conversion to sinking groundline.

*Comment 20:* Many commenters disagreed with NMFS and felt that the seasonal distribution of large whales in the Northeast does occur during the proposed extension period. Another

commenter asked NMFS to clarify this statement. One commenter felt that it is inaccurate for NMFS to assert that risk is low because the primary seasonal component of large whales occurs after April 2009, and that such an assertion is based on insufficient analyses of available data. The commenter believed NMFS failed to consider data indicating that the risk to endangered large whales occurs in areas larger than typically depicted by the Agency and that the Agency did not consider the best scientific data when determining the potential for risk. Commenters noted that many species of whales remain in U.S. North Atlantic waters during some or all of the proposed extension period. Many commenters maintained that the proposed delay would include all trap/pot fisheries along the east coast at a time when humpback and fin whales are known to forage off the mid-Atlantic and during the migratory times for right whales and others traveling along the east coast. One commenter indicated that the earliest month which humpback whales are likely to be seasonally absent from the Gulf of Maine is January, not October and that individuals of all age classes, including late pregnant females and those due to conceive, are sighted and identified in Gulf of Maine waters from October-December. Commenters also stated that the location of the majority of the North Atlantic right whale population during the fall and spring months is poorly understood and may overlap with whatever fishing effort exists. They also pointed to recent sightings in the central Gulf of Maine as indications that this area is a significant overwintering area. Another commenter stated that right whales are routinely found in Northeast waters during the time of the proposed delay and are often detected acoustically when no sightings have occurred. An additional commenter stated that the largest concentration of right whales occurs in late summer in the Bay of Fundy (after the April 5 date) and in spring in Cape Cod Bay and the Great South Channel (before the April 5 date). Commenters stated that aggregations of right whales are known to move out of critical habitat areas, and right whales 13314 and 13346 became entangled in the northern feeding grounds in late fall/early winter, which may be indicative of animals foraging in areas that would be unprotected during the proposed amendment period. One commenter referenced the RIR that accompanied the proposed action, where NMFS stated "some right whales can be found year round".

*Response:* Related to the northeast, NMFS considered that the delay would occur before the primary seasonal distribution of large whales (factoring in that although Cape Cod Bay is seasonally important from January through April, sinking groundline is already required there during this time period). This does not mean that large whales will not enter the northeast during the delay (i.e., from October 5, 2008, through April 5, 2009), but rather that they have a stronger seasonal distribution or presence in the northeast after the delay (except Cape Cod Bay as noted above).

The October 2007 ALWTRP amendment implemented modifications that expanded the temporal and spatial distribution of ALWTRP requirements by considering right, humpback, and fin whale distributions. It is important to note that all ALWTRP requirements other than the broad-based sinking groundline requirement will be in effect during the delay (i.e., year-round in the northeast and seasonally in the mid and south Atlantic).

NMFS cited the FEIS (NMFS 2007), as well as Pace and Merrick (2008), when considering the reasons that the delay would cause minimal impact to large whales. The FEIS (NMFS 2007) does include the seasonal distribution of right, humpback and fin whales which was considered by NMFS when developing the current action. Additionally, NMFS considered an updated NMFS document (i.e., Pace and Merrick, 2008) that identified concentrations of right whales. NMFS does not indicate large whales will be absent during the time period of the delay, but considered the seasonal distribution of large whales in conjunction with other factors noted in the proposed rule and RIR (e.g., gear distribution, buyback, groundline requirements that have/are already in effect in various management areas) when stating that there would be minimal risk to large whales and proposing a delay. The FEIS (NMFS 2007) notes that right whales occupy Cape Cod Bay from December onwards, however, sinking groundline is already required in this area from January 15–April 15. According to Pace and Merrick (2008), the Great South Channel is seasonally important to right whales from April-June which is after the delay; this is also supported by the ALWTRP regulations in which more restrictive management measures (e.g., closures) are effective in the Great South Channel from April 1 - June 30.

*Comment 21:* Many commenters questioned NMFS' use of Pace and Merrick (2008) as an appropriate

citation to support justifications of whale distributions. One commenter maintained the publication only used systematic survey data for right whales from 1970–2005 and did not incorporate acoustic data. Commenters also noted that the research did not consider the distribution of other large whales species covered by the ALWTRP, including humpback whales for which takes also exceed their Potential Biological Removal (PBR) level, and that data used for analysis needed to be more recent than 2005 as numerous DAM zones were implemented from 2006–2008 (before the program expired) during months of the proposed delay (91% of these DAM actions occurring during the proposed delay period). One commenter noted that although the Pace and Merrick (2008) report was relevant, it was undertaken for the purpose of evaluating spatial and temporal boundaries of critical habitat for right whales, not the purpose that NMFS attempts to use it for the proposed action. The commenter also stated that the 2008 report calls into question the technical reports by Merrick (2005) and Merrick et al. (2001), which NMFS relied on heavily in its FEIS (NMFS 2007). As NMFS cites the FEIS for information on distribution in this proposed rule, the commenter felt that NMFS had failed to properly consider caveats provided by its own scientists.

*Response:* NMFS believes considering Pace and Merrick (2008), coupled with information contained in the FEIS (NMFS 2007) was appropriate. The Pace and Merrick (2008) document provides information on right whale presence, and provides some indications of the spatial and temporal patterns of right whales in the Gulf of Maine. Although this document was written for a different purpose than for this particular action, it does provide information about right whale presence that is relevant. As with any study of observational data, this study comes with caveats but it does not necessarily preclude the document from being considered and it includes important information about right whale use in the Gulf of Maine. NMFS also acknowledges that acoustic data is important, but at this time the agency uses this detection tool to determine presence and not relative abundance.

*Comment 22:* One commenter thought it was unclear how buyback programs from Maine to North Carolina could be considered a justification for the proposed delay. The commenter stated that NMFS has not specified the source or nature of the data it used to determine the amount of gear that has been exchanged, nor has NMFS

explained how the gear already exchanged translates into a particular degree of risk reduction along the east coast such that a delay for unconverted gear is warranted and will pose a minor effect to large whales. Another commenter noted that the fact that a large amount of groundline has already been replaced demonstrates that fishermen have long been aware of the pending requirement. An additional commenter felt that conversion of floating line was not uniform, and as a consequence, stated that it could not be assumed that a similar proportion of gear has been converted in each fishery or sub-region.

*Response:* Since 2005, NOAA has promoted trap/pot gear buyback and recycling programs from Maine to North Carolina with over \$3 million in funding appropriated by Congress. This has been done with the assistance of industry and conservation organizations.

NMFS discussed floating groundline buyback programs in Section 7.4.3 of the ALWTRP FEIS (NMFS 2007); the FEIS was referenced in both the proposed rule and RIR. At the time of the FEIS's publication (August 2007), two buyback programs had been implemented. During the fall of 2004 and spring of 2005, the International Fund for Animal Welfare (IFAW), in collaboration with the Massachusetts Division of Marine Fisheries (MA DMF) and the Massachusetts's Lobstermen's Association, conducted a gear replacement program to assist Massachusetts inshore trap/pot lobstermen. Approximately 300,000 pounds (~2,100 miles) of floating groundline was collected and replaced. In mid-January 2006, NMFS conducted a mid-Atlantic gear buyback and recycling program for state and federally permitted trap/pot fishermen in the states of NJ, DE, MD, VA, and NC, in coordination with the National Fish and Wildlife Foundation (NFWF). Nearly 100,000 pounds (~541 miles) of floating groundline was collected.

NMFS noted in the FEIS (NMFS 2007) that the Gulf of Maine Lobster Foundation (GOMLF) had received funding to administer a floating groundline buyback program for state and federally permitted lobster trap/pot fishermen in the state of Maine. The first stage of the "Bottom Line Project" was implemented in May of 2007 and approximately 137,590 pounds (~745 miles) of floating groundline were collected. In FY 08, NOAA made an additional \$356K available to the GOMLF to further their gear buyback and recycling program within the State of Maine. Since publication of the FEIS

(August 2007), Phase II of the GOMLF "Bottom Line Project" has been completed (March-May 2008), and approximately 452,890 pounds (~2,450 miles) of floating groundline was collected from four Maine ports. The GOMLF recently announced summer 2008 rope exchange dates and locations: August 2008 in Ellsworth, ME and September 2008 in Rockland, ME.

An additional recent groundline buyback program targeting state and federally permitted New York trap/pot fishermen was implemented in February 2008 on Long Island, New York, by NFWF and the New York State Department of Environmental Conservation. A total of 15,380 pounds (~83 miles) of floating line was collected and an additional future line collection is being scheduled to make use of remaining funds.

Each agency/group administering the buyback program keeps track on the information related to the program. Specific to NMFS' mid-Atlantic buyback program, NMFS determined the amount of line that could fit into a cardboard box prior to the collection which enabled NMFS to record how much line was collected. NMFS therefore estimates that, to date, a total of 1,422 trap/pot fishermen from ME, MA, NY, NJ, DE, MD, VA, and NC have participated in buyback programs and approximately 1,595,755 pounds (~9,116 miles) of floating groundline has been exchanged. With buyback programs ongoing (e.g., projects in NY and ME), NMFS anticipates additional floating groundline will be collected in the future. Although the buyback programs may not be uniformly distributed, the use of floating groundlines in different fisheries or regions are likewise not uniform. Therefore, NMFS believes a valuable entanglement risk reduction has been provided for large whales in the areas where the gear buyback efforts have occurred.

*Comment 23:* One commenter asked why proposals such as a more narrowly focused, targeted delay, a limited deferral of enforcement, or a "bye" for fishermen that can verify that an order for sinking line has been submitted, were not contemplated. Another commenter stated that NMFS could choose an alternative that provides for flexibility in enforcement while at the same time provides the greatest protection for whales. The commenter suggested NMFS to keep the October 2008 deadline for all aspects of the ALWTRP and then use a "rebuttal presumption" that it is feasible and appropriate for fishermen to comply. If a fisherman is subject to an enforcement action, the burden could be placed on

that individual to show why it was not feasible and/or appropriate for them to comply by October 2008. This would require the agency to set a cut off date by which the affected fisherman would have submitted their orders to known gear manufacturers. If a fisherman without compliant gear is able to document that they submitted their order before June 6, 2008 (or some other date showing a good faith effort by fishermen to comply), then that fisherman could avoid a penalty.

*Response:* NMFS believes that the proposals the commenter suggested cannot be feasibly enforced or implemented. NMFS believes this final action is the best option to ensure compliance with the broad-based sinking groundline requirement with minimal risk to large whales.

*Comment 24:* One commenter stated that if NMFS does move forward with the delay, then the Agency should encourage fishermen to use that time to ensure their gear is 100% compliant with the new implementation deadline and that there will be no more delays or excuses as to why any fishermen have failed to comply. The commenter noted that some lobstermen have made comments in the media that they believe the delay will provide an opportunity to implement an alternative solution to sinking lines in Maine before April 2009. The commenter maintained that even if a Maine working group recently convened were to reach an agreement, the full ALWTRT would need to be consulted and a new rulemaking process initiated, and NMFS would not be able to finalize rulemaking to implement an alternative before April 2009. The commenter believed that NMFS needs to send a clear message to lobstermen that they need to take swift action to convert their gear even with the prospect of an alternative to sinking line.

*Response:* NMFS will be distributing a small entity compliance guide to affected fishermen to notify them of the new broad-based sinking groundline deadline (April 5, 2009), as well as the removal of the “neutrally buoyant line” term and definition. NMFS will also clarify that the removal of the “neutrally buoyant line” term and definition does not change what NMFS is requiring fishermen to use for their groundline (i.e., line that has a specific gravity greater than or equal to 1.030, and, for groundlines only, does not float at any point in the water column). Although the ALWTRT has been discussing possible proposals related to exemptions to the sinking groundline requirement (in exchange for significant reductions in vertical lines) in specific

areas, these have not yet received even conceptual support by the ALWTRT or NMFS. If conceptual support were achieved, significant time would be needed to develop and agree to details of such a proposal. Any associated modification to the ALWTRP, pending approval, would be conducted through a separate rulemaking action. Thus, those discussions occurring with the ALWTRT are on a separate track and are independent of this action.

*Comment 25:* Several commenters believed that fishermen have already had plenty of time to convert their gear within the original 12-month delay in implementation, and questioned why fishermen did not take action to convert their line last winter when their gear was out of the water.

*Response:* Confusion over the type of line the ALWTRP regulations require and debate over potential changes to the regulations have slowed the commercial fishing industry’s progress in converting to sinking groundline. For example, trap/pot fishermen have inquired about the definition of low profile groundline (a line that does not sink, but loops some distance above the ocean bottom lower than floating line), and have asked NMFS for clarification on whether neutrally buoyant line is the same as low profile line. The conversion process has also been slowed by confusion over which trap/pot fisheries are now subject to ALWTRP regulations. Prior to 2007, the only trap/pot fishery subject to ALWTRP requirements was the American lobster fishery. The amendments to the ALWTRP published in October 2007 expanded the scope of the plan to other trap/pot fisheries. In light of this situation, NMFS removed the “neutrally buoyant line” term from the regulations (whereby only “sinking line” remains) to facilitate understanding of the regulations and delayed the effective date of the sinking groundline requirement for trap/pot fisheries from October 5, 2008, to April 5, 2009, to ensure compliance with these requirements.

*Comment 26:* Many commenters believed the proposed action is unnecessarily broad in scope and will relax requirements already in place and being used by many New England fishermen (i.e., fishermen who converted a portion of their gear due to SAM and DAM regulations, and/or MA state lobstermen). Several commenters were concerned fishermen may revert to the use of floating line in the absence of previous requirements for sinking line in certain areas and one commenter failed to see how this situation justified the proposed deferral. Another commenter stated that fishermen who

have yet to make the conversion to sinking groundlines, or that were planning to make the conversion before October, are now being told they have no obligation to use sinking line during the delay.

*Response:* NMFS believes an extended phase-in period is warranted along the Atlantic coast to enable trap/pot fishermen to rig their gear with sinking groundline, but believes fishermen will be continually converting their gear up until the effective date, which will result in progressive risk-reduction to large whales. Additionally, once fishermen have invested significant time and costs into converting to sinking groundline, they are unlikely to reinvest additional resources to reconvert their gear for a short, six-month window. See response to Comment 25.

*Comment 27:* Some commenters felt that although NMFS justified the proposed delay in implementation based upon confusion and/or an inability to comply, the real reason behind the proposed delay is to allow the industry time to undermine the protective measures in the October 2007 ALWTRP final rule. Commenters cited a June 3, 2008, MLA press release, where the group states that the delay would allow them time to “work to find a whale protection plan that is better suited for [their] area” and would allow them to “submit an alternative proposal that would exempt certain additional areas from the sinking line rule”. Several commenters also noted that the Maine senatorial delegation issued a press release shortly before NMFS published its proposal to delay implementation, stating that implementation would be delayed and the delay would provide “an opportunity to improve the rules that will ultimately go into effect” (Snowe 2008). Commenters believed that such statements indicate the intent by the Maine lobster industry to further delay their compliance and to work to undermine and further modify the protections of the October 2007 ALWTRP rule. Commenters also believed that NMFS’ rationale appeared to accommodate the trap/pot industry’s desire to further amend the final rule.

*Response:* Confusion over the type of line the regulations require and debate over potential changes to the regulations have slowed the commercial fishing industry’s progress in converting to sinking groundline. The conversion process has also been slowed by confusion over which trap/pot fisheries are now subject to ALWTRP regulations. In light of this situation, NMFS is delaying the effective date of the sinking

groundline requirement for trap/pot fisheries from October 5, 2008, to April 5, 2009.

Although the ALWTRT has been discussing possible proposals related to exemptions to the sinking groundline requirement (in exchange for significant reductions in vertical lines) in specific areas these have not yet received even conceptual support by the ALWTRT. If conceptual support were achieved, significant work would remain to develop and agree to details of such a proposal. Any associated modification to the ALWTRP, pending approval, would be conducted through a separate rulemaking action. Thus, those discussions occurring with the ALWTRT are on a separate track and are independent of this action. See response to Comment 7 for further clarification.

*Comment 28:* One commenter believed that most of the concerns about the sinking line requirement were coming from Maine fishermen.

Although the MLA asserts that Maine state waters are low risk to whales, the commenter noted that NMFS' own data show whales have become entangled in lobster gear in Maine state waters. Specifically, the commenter stated that a number of documented large whale entanglement cases were from the Maine inshore lobster industry and these numbers likely underestimate all the entanglements.

*Response:* The majority of the east coast lobster trap/pot fishery, is off the state of Maine. Thus, it is not surprising that much of the confusion has occurred in the Northeast. However, there has been confusion in other areas as well. NMFS acknowledges that some entanglements have occurred in gear originally set in Maine state waters; therefore, there are portions of Maine waters that are subject to the ALWTRP regulations.

*Comment 29:* Several commenters questioned why NMFS is not proposing a delay for the gillnet fishing industry, as NMFS began to regulate the Northeast anchored float gillnet and drift gillnet fisheries under the October 5, 2007, final rule (72 FR 57104), in addition to the other new fisheries. The commenters requested that NMFS provide an explanation as to why the regulated gillnet fisheries are apparently capable of complying with the sinking groundline requirement, the limited availability of sinking groundline does not apply to this industry, and there is no confusion as to what constitutes sinking groundline within the gillnet fishery (but all of the above applies to regulated trap/pot fisheries).

*Response:* It is important to note that the newly regulated Northeast anchored

float and drift gillnet fisheries represent much lower effort than the Northeast sink gillnet fishery which has been regulated previously. Additionally, the Northeast sink gillnet fishery in turn represents much lower effort compared to the Atlantic trap/pot fisheries. NMFS believes that the gillnet industry does not require the same amount of time and resources to change over their groundline compared to the trap/pot industry. The gillnet fishery is smaller in size and does not have the length of groundline compared to the trap/pot fishery (NMFS, 2007). Thus, NMFS believes that the gillnet fishery can convert its groundline to sinking line in a shorter amount of time. Additionally, the gillnet fishery is accustomed to using rope that sinks to the bottom (i.e., leadline) versus the trap/pot fishery. Gillnet fishermen have therefore had more experience using line that lies on the bottom of the ocean floor.

*Comment 30:* One commenter questioned NMFS' statement that the delay is needed to avoid a spike in demand which could outstrip the capacity of rope manufacturers and that NMFS has monitored the availability of line. The commenter stated that NMFS has failed to explain why/how the initial 12-month phase-in was inadequate nor has the Agency provided the results of its purported "monitoring" or document that supply has been insufficient over the last 9 months since the publication of the final rule.

*Response:* Those who have yet to complete the conversion to sinking rope would be allowed under this final rule to continue this process for an additional six months. This would reduce compliance costs, since more line could be converted when it ordinarily would need to be replaced, avoiding the costs associated with accelerating gear replacement. This would also help to smooth any spike in demand for sinking line, which could outstrip the capacity of cordage manufacturers, drive up prices, and impair fishermen's ability to comply. See Comment 13 which was written by a manufacturer and which supports NMFS' statements on demand and availability issues. In the October 2007 final rule, NMFS allowed a twelve month phase-in of the sinking groundline requirement based on the magnitude of this requirement. However, as noted in the Record of Decision (ROD) for the October 2007 amendments to the ALWTRP (72 FR 56335, October 3, 2007), NMFS committed to continue to monitor the supply and situation of available rope through discussions with industry

during the upcoming year. Since publication of the final rule, NMFS has monitored both the availability of sinking groundline and the progress of the fishing industry in converting to sinking groundline. Through these efforts, NMFS has determined that both the American lobster fishery and other trap/pot fisheries require additional time to convert to sinking groundline. This has been determined through various forms of NMFS communication (e.g., meetings, phone calls) with stakeholders, including manufacturers, gear suppliers, and industry members.

*Comment 31:* Many commenters noted a potential mistake in the preamble to the proposed rule within the list of reasons NMFS supplies to justify how the impact of the proposed extension would be minimal to large whales. The fifth justification reads, "gear buyback programs from Maine to North Carolina that have assisted in the conversion of sinking groundline for lobster trap/pot fisheries have already removed a large amount of sinking groundline from the ocean." Commenters indicated that the word "sinking" should have actually read "floating". One commenter noted that as written, the statement appears to justify rejecting rather than adopting the delay.

*Response:* In the preamble to the proposed rule, the statement above should have read "gear buyback programs from Maine to North Carolina that have assisted in the conversion of sinking groundline for lobster trap/pot fisheries have already removed a large amount of floating groundline from the ocean." This represented an error during writing the preamble to the proposed rule only, and does not mean the justification should be rejected.

*Comment 32:* Many commenters disputed NMFS' statement that there was confusion within the industry, especially in the Northeast. Commenters believed there was no information provided to evaluate the extent of this confusion, whether it was based on terminology in the October 2007 regulations, and why a simple clarification would not rectify the confusion. Commenters felt the stated confusion does not exist because: (1) thousands of comments have been received from the lobster industry focused on the groundline requirement, indicating that fishery participants have clearly understood what has been proposed for several years; (2) NMFS has invested ample time and effort in advising and preparing fishermen for implementation of this requirement through the development and distribution of extensive outreach materials, including the distribution of

permit holder letters which detailed requirements for compliance (3) NMFS has two fisheries liaisons to bring information about the rule to local fishermen; (4) although the final rule added new fisheries under the ALWTRP, it was clearly stated which new fisheries were added and the proposed rule also contained the same list of fisheries; (5) several of the fisheries are represented on the ALWTRT, and hence, would be aware of pending regulations; (6) the definition of sinking groundline has not been substantively changed since regulation began in 1997 and NMFS has developed a flyer that describes how the Agency will determine the specific gravity of rope; (7) several fishing industry trade publications have written articles on meetings for fishermen about the upcoming changeover of line, funds available and listed manufacturers who offer compliant line from Maine through the mid-Atlantic (CFN 2006, FV 2006); (8) in January, 2007, the State of Massachusetts required all lobstermen to convert to sinking groundlines, using the same specifications as NMFS, and no confusion resulted; and (9) fishermen have been required to convert to sinking line since 2003 due to SAM and DAM regulations. One commenter questioned why NMFS finds it necessary to defer implementation of the rule outside the Northeast if the majority of the confusion is in the Northeast. One commenter believed it was unacceptable for large whales to bear the burden of the Agency's failure to clearly communicate the regulatory requirements of the ALWTRP.

*Response:* Based on the actions commenters note above, NMFS believes numerous fishermen have made the conversion to sinking groundline. However, regardless of the numerous efforts NMFS had undertaken, confusion with the requirements has continued to occur ranging from which type of line is required to which fishermen are impacted and where. The October 5, 2007, amendment to the ALWTRP represented significant modifications to the regulations. Fishermen from Maine through Florida were affected and the rule introduced several new requirements for both fishermen previously regulated under the plan as well as numerous fishermen regulated for the first time by the October 2007 final rule.

#### Comments on NMFS' Mandates

*Comment 33:* Several commenters stated that they believed the proposed delay in implementation would be in violation of the Marine Mammal Protection Act (MMPA). Commenters

explained that according to the MMPA, when the take of a species/population exceeds PBR, it is afforded a take reduction plan and that, under this specification, the death of right whale #3107 should have resulted in a new ALWTRP final rule by 2004, however the final rule was not published until October 2007, only after legal action was taken. One commenter asserted that delaying implementation of the 2007 final rule violates the strict, statutory deadlines of the MMPA requiring the prompt development and issuance of a final rule as well as the timely implementation of that rule. Also, some commenters noted that the deaths of right and humpback whales continue to exceed PBR and that the purpose of a take reduction plan is to "reduce, within six months of its implementation, the incidental mortality or serious injury" of marine mammals "to levels less than" PBR levels (16 U.S.C.1387(f)(2)). One commenter believed that NMFS has been out of compliance with the MMPA's deadlines for development, approval, and implementation of the revised ALWTRP for several years following the death of right whale #3107.

*Response:* The MMPA sets up a process for developing and issuing take reduction plans, monitoring the plans regularly, meeting with the take reduction teams regularly, and making amendments if necessary to meet the goals of the MMPA. NMFS has been acting consistent with that process. The first ALWTRP was issued in 1997, and NMFS has modified the ALWTRP numerous times since with input from the ALWTRT to further these goals of the MMPA to reduce serious injury and mortality of large whales in commercial fisheries.

*Comment 34:* Some commenters stated that they believed the proposed delay would be in violation of the Endangered Species Act (ESA). Under the ESA, NMFS is required to ensure that actions authorized by the Agency are not likely to jeopardize endangered and/or threatened species, and one commenter believed under these provisions, NMFS can not legally authorize the take of a single animal. Two commenters stated that, in the 2001 ESA Section 7 consultations, NMFS identified SAM/DAM programs as Reasonable and Prudent Alternatives (RPAs) to jeopardy for right whales and that NMFS would be in violation of the ESA if current whale protections required under that consultation, including SAM and DAM, were to be phased out before the sinking groundline requirement was

implemented. The commenters requested that, if the Agency moves forward with the delay, then the SAM/DAM programs should be reinstated during the time of the delay, for all areas. Two commenters maintained that, although NMFS stated the delay would pose "minimal" risk, the Agency did not state if it meets the legal standards of the ESA (or the MMPA) to ensure that no right whales will be taken.

*Response:* The proposed delay in the effective date for the use of sinking line on pot/trap gear for all pot/trap fisheries does not violate the ESA. NMFS considered the effects to ESA-listed species under NMFS jurisdiction as a result of the proposed action in accordance with Section 7(a)(2) of the ESA. NMFS concluded that a delay in the effective date of the requirement to use sinking line will delay by six months the benefit to ESA-listed cetaceans anticipated as a result of the October 5, 2007 final rule (72 FR 57104) requiring the broad-based use of sinking groundline. However, the proposed action to delay the use of sinking groundline for pot/trap fisheries will not, in itself, cause harm to ESA-listed cetaceans. Since switching to sinking line is neither likely to benefit or harm ESA-listed sea turtles, shortnose sturgeon, or Gulf of Maine Distinct Population Segment of Atlantic salmon, a delay in the effective date for the use of sinking line on pot/trap gear is also not expected to benefit or harm these species.

NMFS has reinitiated ESA Section 7 consultation on the continued authorization of the federal lobster fishery as well as the multispecies, monkfish, and spiny dogfish fisheries given the changes to the ALWTRP, specifically the elimination of the DAM and SAM programs. Those consultations are in-progress.

As noted in the recent ALWTRP final rule (72 FR 57104, October 5, 2007; 73 FR 19171, April 9, 2008) the DAM and SAM programs were being replaced with a broad-based management scheme. Specifically, when the majority of the broad-based gear modifications became effective on April 5, 2008, the DAM program was eliminated. Also, the final rule eliminated the SAM program effective October 5, 2008 when the broad-based sinking/neutral buoyant groundline requirement was to be effective. However, the proposed action does not change the requirement to use sinking groundline on pot/trap gear in areas where this modification is already required by the ALWTRP (either previously or as of April 5, 2008), such as SAM and the Cape Cod Restricted Areas. Broadening the DAM and SAM

gear modifications in time and space to all gillnet and trap/pot fisheries is more protective to large whales than the limited temporal and spatial DAM and SAM programs required in the RPA, even given the delay in effective date for the use of sinking line on pot/trap gear. In addition, NMFS has determined that large whales will be minimally effected by the delay in effective date given that: (1) the majority of the conservation measures included in the amendment to the ALWTRP would already be in place; (2) fishermen in special right whale management areas have already converted to sinking groundline as described above; (3) most trap/pot gear is out of the water during a portion of the time period before the broad-based sinking groundline requirements go into effect; (4) the primary seasonal distribution of large whales in the Northeast does not occur during the proposed delay time period (Pace and Merrick 2008; NMFS 2007) (where the majority of confusion has been reported to have occurred); and (5) gear buyback programs from Maine to North Carolina that have assisted in the conversion of sinking groundline for lobster trap/pot fisheries have already removed a large amount of sinking groundline from the ocean.

*Comment 35:* One commenter asserted that delaying the implementation of the 2007 sinking groundline requirement will be in violation of the settlement agreement in *HSUS v. Gutierrez* (Civ. No. 07–0333). The commenter maintained that if NMFS decides to amend its “final” ALWTRP rule before it is ever implemented, the agency will violate the terms of the settlement which required the submission of an actual final rule on October 1, 2007. According to the commenter, the settlement agreement also requires the agency to either seek parties’ consent or an order of the court if it wishes to modify the date upon which the final rule is due, and the commenter believed NMFS has failed to comply with these procedures.

*Response:* NMFS believes that the settlement agreement was fully complied with because the agreement only addressed publication of the final rule, and the settlement was silent with respect to anything else, including any delay of any effective dates. Specifically, the settlement agreement required NMFS to submit a final rule to the **Federal Register** by October 1, 2008, which NMFS did. The agreement does not obligate NMFS in any way regarding the substance of that final rule (or what would happen after the final rule was issued).

*Comment 36:* One commenter believed that a categorical exclusion (CE) for this proposed rule is not appropriate under the National Environmental Policy Act (NEPA) and/or NOAA Administrative Order 216–6 (NAO 216–6) and hence, NMFS is not relieved of its NEPA obligations. The commenter maintained that pursuant to NEPA, the Agency must either prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) to consider the “significant” impacts of this proposal. The commenter believed NMFS could not argue the proposal to extend the implementation deadline was the “same” as any other previous action where NMFS has already demonstrated no “significant impacts” would result, nor has the agency considered the impact of removing SAM and/or DAM programs without substituting broad-based gear requirements. The commenter states that by issuing an EIS for the October 2007 ALWTRP amendment NMFS concluded implementing the ALWTRP would cause “significant impacts,” and therefore NMFS could not now justify its decision that the delay would not have “significant impacts”. To further demonstrate the inappropriateness of a CE and how the proposed action would have “significant impacts”, the commenter listed several factors defined under 40 CFR 1508.27 and believed the following: (1) the proposed delay will be highly controversial with the public, as is the science NMFS is using to support its CE determination; (2) there are questions regarding the data and science NMFS is relying on; (3) there may be a cumulatively significant impacts on the environment from the delay; (4) a delay in implementation will affect three endangered species (right, humpback, and fin whales), and NMFS’ **Federal Register** notice does not mention the species or their status; and (5) the proposed delay will violate the MMPA’s deadlines.

*Response:* NMFS determined that this action is categorically excluded from the requirement to prepare an EA or EIS in accordance with sections 6.03a.3(a) and 6.03c.3(d) of NAO 216–6. NMFS added clarification text to the “Classification” section of the proposed rule to relate each section to the associated action being considered, and expands upon the justification here. Under section 6.03a.3(a) of NAO 216–6 the revision includes a delay amendment that “will hold no potential for significant environmental impacts.” Specifically, NMFS has determined that the impact on large whales from this delay would

be minimal (see response to Comment 34 below for information on the rationale). Additionally, NMFS determined that a delay in the effective date of the requirement to sinking line will delay the benefit afforded by this change for six months, but will not, in itself, cause harm to ESA-listed cetaceans. Additionally, under section 6.03c.3(d) of NAO 216–6 this amendment would will facilitate enforcement efforts. Specifically, this action will help to clarify the intent of the agency with respect to the type of sinking line to purchase and to aid in enforcement of the current regulations.

This action does not trigger the exceptions to categorical exclusions listed in NAO 216–6, Section 5.05c, because it:

(1) Does not involve a geographic area with unique characteristics. The Atlantic coast includes many diverse characteristics;

(2) Is not the subject of public controversy based on potential environmental consequences. This action is not scientifically controversial (see response to Comment 37 below);

(3) Does not involve uncertain environmental impacts or unique or unknown risks. See the biological information summarized in the paragraph above, as well as in the proposed rule and RIR;

(4) Does not establish a precedent or decision in principle about future proposals. See responses to Comments 23 and 39 with regards to other proposals;

(5) Does not result in cumulatively significant impacts. NMFS determined that a delay in the effective date of the requirement to sinking line will delay the benefit afforded by this change for six months, but will not, in itself, cause harm to ESA-listed cetaceans. See the biological information summarized in the paragraph above, as well as in the proposed rule and RIR. Also, as noted in NMFS Notice of Intent (NOI) to conduct an EIS (68 FR 38676, June 30, 2003), this EIS was originally intended to analyze impacts to the environment of different management alternatives that would finalize the SAM program. However, due to continuing large whale entanglements in fishing gear since the publication of the SAM interim final rule, NMFS determined that additional modifications to the ALWTRP were needed. Therefore, the notice announced NMFS’ intent to change the scope of the EIS and consider more alternatives for possible amendments to the ALWTRP. Thus, the rationale for the EIS as noted in the NOI was not related to significance but rather expanding the scope of the ALWTRP modifications to

consider. This present action is not as broad in scope as the October 5, 2007, ALWTRP amendment for which a FEIS (NMFS 2007) was conducted and all impacts on the human environment analyzed. This final action represents an ALWTRP amendment that is much more limited in scope and solely represents a 6-month delay of a requirement and deletion of a definition. Additionally, it is important to note that issuing an EIS under NEPA does not mean that an action is significant; and

(6) Does not have any adverse effects upon endangered or threatened species or their habitats. NMFS determined that a delay in the effective date of the requirement to sinking line will delay the benefit afforded by this change but will not, in itself, cause harm to ESA-listed cetaceans. Therefore, if there are no adverse effects expected from this action then there are also no significant adverse impacts (See additional biological information summarized in the paragraph above).

*Comment 37:* One commenter cited *Hawaii County Green Party v. Evans*, where the Northern District of California refused to allow NMFS to issue a CE when amending a scientific research permit, stating that NMFS may not issue a CE if “any of the six exceptions for CEs apply”. The court found NMFS could not issue a CE for the research permit because legitimate public controversy regarding the permit existed. As the commenter felt this proposed action is the subject of public controversy, they also believed a CE is not appropriate.

*Response:* The cited case is an unpublished decision, and dealt with a scientific research permit amendment issued under Section 104 of the MMPA. This final action is an amendment to a take reduction plan (i.e., a management plan), where a CE is appropriate as the six exceptions do not apply. Specifically, related to the exception for public controversy, under NEPA this is only meant for scientific controversy which NMFS has determined is not applicable to this action. The scientific information cited for this rulemaking action is based on information in the FEIS (NMFS 2007), as well as Pace and Merrick (2008). Although the rulemaking that the FEIS supported was controversial, NMFS does not consider the underlying scientific data controversial. Additionally, NMFS does not consider the Pace and Merrick (2008) document to be scientifically controversial.

*Comment 38:* NMFS cites sections 6.03a.3(a) of NAO 216–6 which allows CEs for certain “management plans” and 6.03c.3(d) which allows CEs for

certain “administrative” programs. One commenter believed that none these CE categories were applicable. The commenter stated that 6.03a.3(a)’s authorization of a CE is limited in scope, and although NAO 216–6 does allow CEs to be issued for some “plan amendments”, it specifically requires in 6.03a.3(a) that all “plan amendments not requiring an EIS must be accompanied by an EA unless they meet the criteria of a CE in section 5.05b”. The commenter maintained that NMFS’ proposed delay does not meet the criteria in 5.05b (1) (same action previously determined to have no significant impact) or 5.05b (2) (does not have significant impact under the significance factors in 40 CFR1508.27), and accordingly, the proposed amendment “must be accompanied by an EA”. The commenter also stated that in section 6.03a.3(b), a specific list of “plan amendment” actions that warrant a CE are given; however, NMFS does not and could not claim that any of these actions apply. The commenter maintained that section 6.03a.3(b) is inapplicable, stating that NMFS can not argue that the delay in implementation of this measure is a “minor” or “technical” change to the plan nor that the delay or implementing the delay without extending SAM/DAM or substituting new protection measures would have no effect (6.03a.3(b)(1)). The commenter believed that section 6.03c.3(d) also does not apply to the proposed action, as NMFS can not justify a 6-month delay of implementation as an “administrative or routine” function under this section. The commenter maintained that the proposed rule is a substantive change to the ALWTRP final rule and will have the effect of delaying implementation of critical protection measures for endangered whales. The commenter felt it was unclear which of the administrative programs listed in section 6.03c.3 (d) NMFS would believe the proposed amendment falls into. As NMFS states that extending the implementation date will “facilitate enforcement efforts” the commenter found it unclear if NMFS was suggesting, through this statement, that the delay is exempt under section 6.03c.3 (d) as an “enforcement operation”, and if so, the commenter requested the Agency to explain how extending the implementation deadline has any relationship to facilitating “enforcement”. The commenter went on to assert that “enforcement operations” in 6.03c.3(d) was intended to cover “administrative” enforcement decisions, not broad, substantive, rulemaking

decisions regarding compliance dates. Lastly, the commenter stated that NAO 216–6 contains a specific section governing NEPA actions for MMPA-related decisions, and that according to section 6.03f.1, this “take reduction plan amendment” requires require an EA, and hence, NMFS is not authorized to issue a CE for the proposed action.

*Response:* NMFS has determined that this final rule constitutes a change to a management plan where a CE is appropriate under section 6.03a.3(a) of NAO 216–6. Section 6.03f.1. of NAO 216–6 relates to the issuance of take reduction plans between marine mammals and commercial fisheries, and not necessarily amendments. NMFS did conduct an EA on the original implementing regulations to the ALWTRP in 1997. It was never NMFS’ intent for the implementation of the six month delay to be labeled as “administrative” or as an “enforcement operation”; thus, NMFS relied upon section 6.03a.3(a) of NAO 216–6 for the six month delay.

NMFS used section 6.03c.3(d) for the portion of this action of deleting the term “neutrally buoyant line” in the October 5, 2007, final rule to facilitate enforcement efforts. In the October 5, 2007, final rule, NMFS included both the terms “sinking” and “neutrally buoyant” line, with identical definitions, in an attempt to include familiar industry terms and assist in the understanding of the regulations. However, industry feedback since the final rule published indicates that using two terms has led to confusion and resulted in some fishermen not understanding what type of line is required for the groundline. Additionally, trap/pot fishermen have inquired about the definition of low profile groundline (a line that does not sink, but loops some distance above the ocean bottom lower than floating line), and have asked NMFS for clarification on whether neutrally buoyant line is the same as low profile line. Therefore, in order to ensure clarity regarding the groundline requirement, this action would remove all references to the term “neutrally buoyant line” from the regulations (whereby only “sinking line” would remain) to facilitate both industry understanding of the regulations and enforcement efforts of this requirement. Therefore, this change is for both clarification of the regulations for fishermen and to facilitate enforcement. However, NMFS also believes that section 6.03a.3(b)(2) could also have been cited based on this being a minor technical change to a management plan. It is also important to clarify that NMFS did not rely on

section 6.03a.3(b)(1) for the CE. See response to Comment 36 which also addresses comments on NAO 216–6. See response to Comment 34 for information on the elimination of the SAM and DAM programs.

*Comment 39:* One commenter noted that no other alternatives were considered in the proposed rule.

*Response:* Under NEPA, alternatives are not required when a CE is issued.

#### Comments on Removal of “Neutrally Buoyant Line” and Its Associated Definition

*Comment 40:* Many commenters supported the proposed removal of the term “neutrally buoyant line” and its associated definition from the ALWTRP regulations. Commenters agreed with NMFS that the deletion of this term will avoid potential conflict within the regulations, ensure a clearer understanding among fishermen and management, and assist in enforcement efforts. One commenter stated that the proposed change would not alter existing requirements and could reduce confusion. Another commenter agreed that the proposed deletion will eliminate some of the confusion within the industry as to which rope is legal to fish with under the ALWTRP.

*Response:* NMFS agrees with the comments.

#### Classification

This final action is categorically excluded from the requirement to prepare an Environmental Assessment in accordance with sections 6.03a.3(a) and 6.03c.3(d) of NAO 216–6. Specifically, under section 6.03a.3(a) of NAO 216–6 the revision includes a delay amendment that “will hold no potential for significant environmental impacts,” and under section 6.03c.3(d) of NAO 216–6 the revision includes removal of the “neutrally buoyant line” term and definition which would will facilitate enforcement efforts. This action does not trigger the exceptions to categorical exclusions listed in NAO 216–6, Section 5.05c; thus, a categorical exclusion memorandum to the file has been prepared. This final rule has been determined to be not significant for the purposes of Executive Order 12866.

This final rule does not contain a collection of information requirements subject to the Paperwork Reduction Act (PRA).

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small

entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

NMFS has determined that this final action is consistent to the maximum extent practicable with the approved coastal management program of the U.S. Atlantic coastal states. The proposed rule was submitted to the responsible state agencies for review under section 307 of the Coastal Zone Management Act. The following states agreed with NMFS’ determination: New Hampshire, Rhode Island, New Jersey, Pennsylvania, Delaware, Virginia, and Georgia. Maine, Massachusetts, Connecticut, New York, Maryland, North Carolina, South Carolina, and Florida did not respond, therefore, consistency is inferred.

This final rule contains policies with federalism implications as that term is defined in Executive Order 13132. Accordingly, the Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed rule to the appropriate official(s) of affected state, local, and/or tribal governments. Letters were sent to officials in Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, Delaware, North Carolina, South Carolina, Georgia and Florida. No concerns were raised by the states contacted; hence, NMFS will infer that these states concur with the finding that the proposed regulations for amending the ALWTRP were consistent with fundamental federalism principles and federalism policymaking criteria.

#### References

NMFS. 2007. Final Environmental Impact Statement for Amending the Atlantic Large Whale Take Reduction Plan: Broad-Based Gear Modifications. Prepared by: Industrial Economics, Inc. and NOAA’s National Marine Fisheries Service. Northeast Region.

Pace, Richard M. III, and Merrick, Richard. 2008. Northwest Atlantic Ocean Habitats Important to the Conservation of North Atlantic Right Whales. Northeast Fisheries Science Center Reference Document 08–07. 32 pp.

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

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

Dated: August 25, 2008.

**James W. Balsiger,**

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

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

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

■ 1. The authority citation for 50 CFR part 229 continues to read as follows:

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

■ 2. In § 229.2, the definition “Neutrally buoyant line” is removed and the definition of “Sinking line” is revised to read as follows:

#### § 229.2 Definitions.

\* \* \* \* \*

*Sinking line* means, for both groundlines and buoy lines, line that has a specific gravity greater than or equal to 1.030, and, for groundlines only, does not float at any point in the water column.

\* \* \* \* \*

■ 3. In § 229.32, revise paragraphs (a)(4), (c)(2)(ii)(D), (c)(2)(ii)(E), the first sentence of paragraphs, (c)(5)(ii)(B), (c)(6)(ii)(B), (c)(7)(ii)(C), (c)(8)(ii)(B), (c)(9)(ii)(B), (d)(6)(ii)(D), (d)(7)(ii)(D), (i)(3)(i)(B)(1)(i), (i)(3)(i)(B)(2)(i), and the second sentence of (d)(1)(i) to read as follows:

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

(a) \* \* \*

(4) *Sinking groundline exemption.*

The fisheries regulated under this section are exempt from the requirement to have groundlines composed of sinking line if their groundline is at a depth equal to or greater than 280 fathoms (1,680 ft or 512.1 m) (as shown on NOAA charts 13200 (Georges Bank and Nantucket Shoals, 1:400,000), 12300 (NY Approaches - Nantucket Shoals to Five Fathom Bank, 1:400,000), 12200 (Cape May to Cape Hatteras, 1:419,706), 11520 (Cape Hatteras to Charleston, 1:432,720), 11480 (Charleston Light to Cape Canaveral, 1:449,659) and 11460 (Cape Canaveral to Key West, 1:466,940)).

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(ii) \* \* \*

(D) *Buoy lines.* All buoy lines must be composed of sinking line except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line.

(E) *Groundlines*. All groundlines must be composed entirely of sinking line. The attachment of buoys, toggles, or other floatation devices to groundlines is prohibited.

\* \* \* \* \*

(5) \* \* \*

(ii) \* \* \*

(B) *Groundlines*. On or before April 5, 2009, all groundlines must be composed entirely of sinking line unless exempted from this requirement under paragraph (a)(4) of this section. \* \* \*

\* \* \* \* \*

(6) \* \* \*

(ii) \* \* \*

(B) *Groundlines*. On or before April 5, 2009, all groundlines must be composed entirely of sinking line unless exempted from this requirement under paragraph (a)(4) of this section. \* \* \*

\* \* \* \* \*

(7) \* \* \*

(ii) \* \* \*

(C) *Groundlines*. On or before April 5, 2009, all groundlines must be composed entirely of sinking line unless exempted from this requirement under paragraph (a)(4) of this section. \* \* \*

\* \* \* \* \*

(8) \* \* \*

(ii) \* \* \*

(B) *Groundlines*. On or before April 5, 2009, all groundlines must be composed entirely of sinking line unless exempted from this requirement under paragraph (a)(4) of this section. \* \* \*

\* \* \* \* \*

(9) \* \* \*

(ii) \* \* \*

(B) *Groundlines*. On or before April 5, 2009, all groundlines must be composed entirely of sinking line unless exempted from this requirement under paragraph (a)(4) of this section. \* \* \*

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(i) \* \* \* If more than one buoy is attached to a single buoy line or if a high flyer and a buoy are used together on a single buoy line, sinking line must be used between these objects.

\* \* \* \* \*

(6) \* \* \*

(ii) \* \* \*

(D) *Groundlines*. On or before October 5, 2008, all groundlines must be composed entirely of sinking line unless exempted from this requirement under paragraph (a)(4) of this section. \* \* \*

\* \* \* \* \*

(7) \* \* \*

(ii) \* \* \*

(D) *Groundlines*. On or before October 5, 2008, all groundlines must be

composed entirely of sinking line unless exempted from this requirement under paragraph (a)(4) of this section. \* \* \*

\* \* \* \* \*

(i) \* \* \*

(3) \* \* \*

(i) \* \* \*

(B) \* \* \*

(1) *Anchored gillnet gear*—(i)

*Groundlines*. All groundlines must be made entirely of sinking line. \* \* \*

\* \* \* \* \*

(2) *Trap/pot gear*—(i) *Groundlines*.

All groundlines must be made entirely of sinking line. \* \* \*

\* \* \* \* \*

[FR Doc. E8–20167 Filed 8–29–08; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 071106673–8011–02]

RIN 0648–XK14

### Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; closures and openings.

**SUMMARY:** NMFS is prohibiting directed fishing for Atka mackerel in the Eastern Aleutian District and the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI) by vessels participating in the BSAI trawl limited access fishery. This action is necessary to prevent exceeding the 2008 total allowable catch (TAC) of Atka mackerel in these areas by vessels participating in the BSAI trawl limited access fishery. NMFS is also announcing the opening and closing dates of the first and second directed fisheries within the harvest limit area (HLA) in areas 542 and 543. These actions are necessary to conduct directed fishing for Atka mackerel in the HLA in areas 542 and 543.

**DATES:** The effective dates are provided in Table 1 under the **SUPPLEMENTARY INFORMATION** section of this temporary action.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Hogan, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 TAC of Atka mackerel for vessels participating in the BSAI trawl limited access fishery in the Eastern Aleutian District and the Bering Sea subarea was established as 319 metric tons (mt) by the 2008 and 2009 final harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008), reallocation (73 FR 44173, July 30, 2008), and correction (73 FR 47559, August 14, 2008).

In accordance with § 679.20(d)(1)(i) and (d)(1)(ii)(B), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that 159 mt of the 2008 Atka mackerel TAC allocated to vessels participating in the BSAI trawl limited access fishery in the Eastern Aleutian District and the Bering Sea subarea will be necessary as incidental catch to support other anticipated groundfish fisheries. Therefore, the Regional Administrator is establishing a directed fishing allowance of 160 mt. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the Eastern Aleutian District and the Bering Sea subarea by vessels participating in the BSAI trawl limited access fishery.

In accordance with § 679.20(a)(8)(iii)(C), the Regional Administrator is opening the first directed fisheries for Atka mackerel within the HLA in areas 542 and 543, 48 hours after prohibiting directed fishing for Atka mackerel in the Eastern Aleutian District and the Bering Sea subarea. The Regional Administrator has established the opening dates for the second HLA directed fisheries as 48 hours after the last closure of the first HLA fisheries in either area 542 or 543. Consequently, NMFS is opening and closing directed fishing for Atka mackerel in the HLA of areas 542 and 543 in accordance with the periods listed under Table 1 of this notice.