

FROM :

FAX NO. : 7278245309

Feb. 09 2006 03:30PM P3

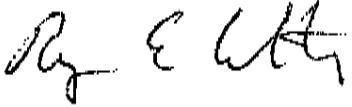


UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
 NATIONAL MARINE FISHERIES SERVICE
 Southeast Regional Office
 263 13th Avenue, South
 St. Petersburg, FL 33701
 (727) 824-5301; FAX 824-5320
<http://sero.nmfs.noaa.gov>

FEB 9 2006

F/SER32:JCL

MEMORANDUM FOR: William T. Hogarth, Ph.D.
 Assistant Administrator for Fisheries

FROM: Roy E. Crabtree, Ph.D. 
 Regional Administrator

SUBJECT: Temporary rule to prohibit, through March 31, 2006, any vessel from fishing with any gillnet gear in the Southeast U.S. Restricted Area – **DECISION MEMORANDUM**

I recommend that you approve and make determinations about the attached temporary rule to prohibit, through March 31, 2006, any vessel from fishing with any gillnet gear in the Southeast U.S. Restricted Area, encompassing Atlantic Ocean waters between 32°00' N. lat. (near Savannah, GA) and 27°51' N. lat. (near Sebastian Inlet, FL) and extending from the shore eastward out to 80°00' W. long.

BACKGROUND

NMFS developed the Atlantic Large Whale Take Reduction Plan (ALWTRP) based on recommendations by the Atlantic Large Whale Take Reduction Team (ALWTRT). The ALWTRP, implemented through regulations at 50 CFR 229.32, relies on a combination of fishing gear modifications, operational restrictions, and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear. Because of the right whale's extremely endangered status and its Potential Biological Removal (PBR) level of zero, there was great concern about serious injury or mortality to right whales. Therefore, NMFS included in the ALWTRP regulations contingency measures that would allow further restrictions on fishing in the Cape Cod Bay critical habitat, Great South Channel restricted area, and the Southeast U.S. Restricted Area, if a right whale mortality or serious injury occurs as a result of entanglement in fishing gear. Specifically, 50 CFR 229.32(g)(1) states that if a serious injury or mortality of a right whale occurs in the Southeast U.S. Restricted Area from November 15 through March 31 as a result of an entanglement by gillnet gear allowed to be used in that area and time, NOAA's Assistant Administrator for Fisheries (AA) shall close that area to that gear type for the rest of that time period and for that same time period in each subsequent year, unless the AA revises the restricted period or unless other measures are implemented.



FROM :

FAX NO. : 7278245309

Feb. 09 2006 03:30PM P4

On January 22, 2006, a right whale calf was found floating dead approximately 16.5 nautical miles off Jacksonville Beach, FL. On January 23, a specialized large whale necropsy team performed a thorough necropsy of the whale. Our determination based on preliminary findings is that the entanglement of the whale appears to have precipitated the demise of the animal. The calf, while alive, and its mother were documented during aerial surveys off Georgia and northeast Florida on multiple occasions. These sightings occurred exclusively within the ALWTRP's Southeast U.S. Restricted Area. Based on this, as well as information regarding increased gillnet fishing effort off Jacksonville, Florida, I recommend that you determine that the entanglement of this whale in the Southeast U.S. Restricted Area warrants taking immediate action to close this area to all gillnet fishing, in accordance with the ALWTRP regulations at 50 CFR 2229.32(g)(1).

An environmental assessment has been completed for this action pursuant to NRPA. We have evaluated the potential effects of this action on ESA-listed species as required under section 7 of the ESA. The effect of this rule will be to eliminate the threat of further serious injury or mortality of large whales due to entanglement in gillnets in the Southeast U.S. Restricted Area. North Atlantic right whales, in particular, will benefit from this action as the species will be afforded additional protection from entanglement in their Florida/Georgia calving area during their winter calving season. We have determined that the temporary rule is not likely to adversely affect listed species or designated critical habitat. In fact, the rule will benefit all listed species in the area by eliminating the threat of entanglement from gillnets in the Southeast U.S. Restricted Area. Failing to take the action, on the other hand, could result in additional take of right whales. Because we cannot implement long-term restrictions, as called for in the ALWTRP, through this temporary rule for various reasons, we intend to address the need for future restrictions in the Southeast U.S. Restricted Area through future rulemaking, in consultation with the Atlantic Large Whale Take Reduction Team.

If we can provide any additional information, please contact Vicki Cornish of the Protected Resources Division at (727) 551-5771.

RECOMMENDATION

I recommend that you (1) approve the temporary rule and (2) waive the 30 day delayed effectiveness of this rule.

I concur: W. H. ... FEB 10 2006
Date

I do not concur: _____
Date

Attachments

FROM :

FAX NO. : 7278245309

Feb. 09 2006 03:30PM P5

DETERMINATIONS

Marine Mammal Protection Act (MMPA)

NMFS is taking this action because of its determination that a right whale mortality that was documented on January 22, 2006, within the Southeast U.S. Restricted Area, was the result of entanglement in gillnet gear. This action is necessary to protect North Atlantic right whales from further serious injury or mortality in the Southeast U.S. Restricted Area (50 CFR 229.32(f)(1)(i)), and directly supports the mandates under section 118 of MMPA, implemented through regulations at 50 CFR 229.32. Specifically, regulations at 50 CFR 229.32(g)(1) state that if a serious injury or mortality of a right whale occurs in the Southeast U.S. Restricted Area from November 15 through March 31 as a result of an entanglement by gillnet gear allowed to be used in that area and time, NOAA's Assistant Administrator for Fisheries (AA) shall close that area to that gear type for the rest of that time period and for that same time period in each subsequent year, unless the AA revises the restricted period or unless other measures are implemented.

Regulatory Flexibility Act (RFA), Executive Order (E.O.) 12866, and Congressional Review Act

Congress passed the Regulatory Flexibility Act (RFA) to ensure federal agencies consider the impacts of regulations, taking into account the special needs and concerns of small businesses through an initial regulatory flexibility analysis. The RFA analysis for the proposed action demonstrates it will not have a significant economic impact on a substantial number of small entities. However, this action is exempt from the RFA because it is not subject to public notice and comment.

E.O. 12866 requires that the Office of Management and Budget (OMB) review proposed regulatory programs that are likely to be "significant." NMFS complies with the E.O. through the preparation of a Regulatory Impact Review (RIR) for significant actions. Based on the analysis in the environmental assessment (EA) prepared for this rule, this rule has been determined to be not significant for the purposes of the E.O.

The Small Business Regulatory Enforcement Fairness Act of 1996 added Chapter 8 to Title 5, United States Code, to provide for congressional review, and potential disapproval, of agency rulemaking. Agencies are required to certify to OMB whether actions are "major" for purposes of these provisions, which may delay publication of rules. This action was determined as "not major" for purposes of 5 U.S.C. 801 *et seq.*

National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) requires federal agencies to assess the effects of major federal actions on the quality of the human environment through an environmental impact statement or EA. These analyses describe the level of significance of the impact resulting from the proposed federal action. NMFS prepared an EA for this action, which resulted in a finding of no significant impact in accordance with NEPA.

FROM :

FAX NO. : 7278245309

Feb. 09 2006 03:31PM P6

Endangered Species Act (ESA)

The ESA imposes on all federal agencies a duty to ensure agency actions do not jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species. To effectuate the ESA's requirement to avoid jeopardy and adverse modification, the ESA requires the "action" agency to consult with an "expert" agency to evaluate the effects a proposed agency action may have on a listed species. If the action agency determines through preparation of a biological assessment or informal consultation the preferred alternative is "not likely to adversely affect" listed species or critical habitat, formal consultation is not required so long as the expert agency concurs.

The NMFS' SERO has evaluated the potential effects of this action on ESA-listed species as required under section 7 of the ESA. The effect of this rule will be to eliminate the threat of further serious injury or mortality of right whales due to entanglement in gillnets in the Southeast U.S. Restricted Area. North Atlantic right whales, in particular, will benefit from this action as the species will be afforded additional protection from entanglement in their Florida/Georgia calving area during their winter calving season. NMI'S' SERO has determined that the temporary rule is not likely to adversely affect listed species or designated critical habitat. In fact, the rule will benefit all listed species in the area by eliminating the threat of entanglement from gillnets in the Southeast U.S. Restricted Area. Failing to take the action, on the other hand, could result in additional take of right whales. Section 7 consultation on this temporary rule was concluded on February 3, 2006. Because we cannot implement long-term restrictions, as called for in the ALWTRP, through this temporary rule for various reasons, we intend to address the need for future restrictions in the Southeast U.S. Restricted Area through future rulemaking, in consultation with the Atlantic Large Whale Take Reduction Team. Any future rulemaking will be subject to section 7 consultation.

Coastal Zone Management Act (CZMA)

Per 15 CFR 930.82(b) a federal agency may deviate from full consistency with an approved program when such deviation is justified because of an emergency. Federal agencies shall consult with state agencies to the extent that an exigent circumstance allows and shall attempt to seek state agency concurrence prior to addressing the exigent circumstance. Once the exigent circumstances have passed, and if the federal agency is still carrying out an activity with coastal effects, federal agencies shall comply with all applicable provisions of this subpart. Once the federal agency has addressed the exigent circumstance or completed its emergency response activities, it shall provide the state agency with a description of its actions and their coastal effects.

NMFS sent letters dated February 3, 2006, to the CZMA coordinators of Florida and Georgia making the determination that this temporary rule was consistent to the maximum extent practicable with the coastal zone management programs of those states.

FROM :

FAX NO. :7278245309

Feb. 09 2006 03:31PM P7

Paperwork Reduction Act (PRA)

The purpose of the PRA is to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, and other persons resulting from the collection of information by or for the Federal Government. This rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Data Quality Act

This product has undergone a pre-dissemination review by the Protected Resources Division of the Southeast Regional Office, completed on February 3, 2006, which found the product complies with applicable information quality guidelines implementing the Data Quality Act (Section 515 of Public Law 106-554).

Essential Fish Habitat (EFH)

Pursuant to the Magnuson-Stevens Act, federal agencies must undergo a consultation process regarding any of their actions authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken that may adversely affect EFH. The area affected by the rule has been identified as EFH through several FMPs. NMFS determined that the rule would not adversely affect EFH of species managed by NMFS or the South Atlantic Regional Fishery Management Council. Further coordination on this matter was not deemed necessary unless future modifications are proposed that may adversely impact EFH.