



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE

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

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

SUBJECT: Measures to Protect Right Whales in their Southeast U.S. Calving  
Habitat – **DECISION MEMORANDUM**

Attached for your review and approval is a final rule for publication in the *Federal Register*. The final rule implements, with revisions, existing regulations of the Atlantic Large Whale Take Reduction Plan (ALWTRP) by expanding the Southeast U.S. Restricted Area to include waters within 35 nautical miles of the South Carolina coast; dividing the Southeast U.S. Restricted Area into Southeast U.S. Restricted Areas North and South; and modifying regulations pertaining to gillnetting within the Southeast U.S. Restricted Area. Specifically, the rule prohibits gillnet fishing and possession within the Southeast U.S. Restricted Area during annual restricted periods associated with the right whale calving season (November 15 – April 15). Exemptions to the fishing prohibitions are provided for strikenet fishing for sharks and gillnet fishing for Spanish mackerel south of 29°00' N lat. An exemption to the possession prohibition is provided for transiting through the area if gear is stowed in accordance with this rule. This final rule is based on the proposed rule, the underlying administrative record, and public comments received on the proposed rule.

#### BACKGROUND

On January 22, 2006, a dead right whale calf was reported offshore of Jacksonville Beach, Florida. A necropsy was performed on the calf by a specialized large whale necropsy team. Based on necropsy and histology results, NMFS determined the calf ultimately died from gillnet entanglement. The sightings history for the calf indicated entanglement and death occurred within the Southeast U.S. Restricted Area. As a result of these findings, NMFS enacted temporary restrictions on gillnet fishing in the Southeast U.S. Restricted Area (71 FR 8223, February 16, 2006), in accordance with ALWTRP regulations at 50 CFR 229.32(g)(1). The ALWTRP regulations at 50 CFR 229.32(g)(1) require a permanent closure of the



Southeast U.S. Restricted Area if a right whale mortality or serious injury occurs in this area from entanglement in gillnet gear allowed to be used in this area and time, unless the Assistant Administrator revises the closure in accordance with the provisions of section 229.32(g)(2).

On April 11 and 12, 2006, NMFS convened a meeting of a subset of the Atlantic Large Whale Take Reduction Team's Mid-Atlantic/Southeast Subgroup (the SE Subgroup) to gather additional information to assist in determining permanent measures to be taken. The SE Subgroup reached consensus on recommended management measures for the Southeast U.S. Restricted Area south of 29°00' N lat., which included an annual gillnet prohibition from December 1 - March 31, with exemptions for the Southeastern U.S. Atlantic shark gillnet fishery and Southeast Atlantic gillnet fishery. The SE Subgroup did not reach consensus on potential management measures for the Southeast U.S. Restricted Area north of 29°00' N lat. Subsequent to the SE Subgroup meeting, the Marine Mammal Commission (MMC) recommended to NMFS, in a letter dated May 15, 2006, a prohibition of gillnet gear in the Southeast U.S. Restricted Area north of 29°00' N lat. and an expansion of the Southeast U.S. Restricted Area to include waters 40 miles offshore South Carolina.

NMFS must comply with the regulations implementing the ALWTRP at 50 CFR 229.32(g)(1), which require NMFS to prohibit gillnet fishing in the Southeast U.S. Restricted Area from November 15 - March 31, unless appropriate modifications or exemptions are implemented pursuant to 50 CFR 229.32(g)(2). NMFS published a proposed rule on November 15, 2006, to implement the ALWTRP regulations, with revisions. NMFS recognized regulations promulgated through the standard rulemaking process would not allow for a final permanent rule to be effective by the start of the 2006/2007 right whale calving season, and because we believed continued gillnet fishing in the Southeast U.S. Restricted Area north of 29°00' N ("Southeast U.S. Restricted Area N") posed a significant risk to the well-being of right whales, we implemented an ESA section 4(b)(7) emergency rule to close the Southeast U.S. Restricted Area N, effective November 15, 2006, to coincide with the date right whales begin to arrive in and utilize this core calving area. Together, the two actions were intended to provide necessary additional protections to right whales on their southeast calving grounds.

## EVALUATION OF PUBLIC COMMENTS RECEIVED

The initial 30-day comment period for the proposed rule was extended through January 31, 2007, at the request of the MMC and the state of North Carolina. NMFS received 4,571 public comments on the proposed rule; of these, nearly 4,550 were form letters or slightly modified form letters supporting the proposed measures. Substantive comments were received regarding the following issues: 1) Exemption to prohibition on gillnet possession for vessels working out of Little River Inlet that fish with gillnets off North Carolina; 2) Expansion of the restricted area; 3) Alternate dates for restricted period; 4) Exemptions for recreational and scientific gillnetting; 5) Whether there is an adequate evidentiary basis to implement a closure under 50 CFR 229.32(g)(1); and 6) Failure to consider an alternative that would allow continued gillnet fishing north of 29°00' N lat. and avoid a disproportionate impact to North Carolina gillnet fishers. In the final rule we respond to the comments and further clarify the basis for our decisions.

## FINAL RULE

The attached final rule contains the gillnet restrictions outlined in the proposed rule, with a modification of the northern boundary of the Restricted Area to allow passage through the Little River Inlet on the South Carolina/North Carolina border. The movement of the boundary south by approximately one mile results in a negligible increase in entanglement risk to right whales, but alleviates the concerns expressed by commercial fishermen, members of the North Carolina Marine Fisheries Commission, and South Carolina Department of Natural Resources regarding safety issues associated with North Carolina and South Carolina gillnet fishermen using the closest inlet outside of the Restricted Area.

The boundary of the Restricted Area is not being extended to 40 nm off the coast of South Carolina, based on a re-examination of aerial survey data and predictive modeling efforts that indicate the most suitable habitat for right whales extends to 27 nm from shore. Because right whales have been detected beyond this distance from shore, we determined a 35 nm boundary would provide a sufficient buffer. We have no data to suggest that right whale cow/calf distribution extends beyond 35 nm from shore; therefore, the rule does not extend the Restricted Area boundary to the eastern edge of the EEZ. The dates of the restricted period in the final rule have not been changed from those in the proposed rule in response to the commenter's proposal because a re-analysis of right whale sightings and aerial survey data indicates whales are present south of the Georgia/Florida border beyond April 1. Similarly, the restricted period is not being extended to November 1 – April 30 because these dates are not supported by right whale sightings and aerial survey data. Maintaining the restricted period as proposed also provides consistency with the dates outlined in the larger ALWTRP proposed rule.

The rule clarifies that the restrictions do not apply to recreational and scientific research gillnetting, since the rule is amending ALWTRP regulations that apply only to commercial fisheries. We acknowledge these fisheries are not exempt from the take prohibitions under either the ESA or MMPA, and would need applicable authorizations if right whale takes were anticipated.

## EXPECTED PUBLIC REACTION

The final rule is not expected to be controversial. Little negative public comment was received on the proposed rule, even from the fishing industry. There was some inaccurate news coverage that raised questions about the validity of the determination that gillnet entanglement caused the January 22, 2006, right whale calf death. Subsequently, Mr. Gregory P. DiDomenico, Garden State Seafood Association, and Mr. Sean McKeon, North Carolina Fisheries Association, have submitted a FOIA request for more information on the circumstances of the right whale calf's death.

This action was developed, in part, through a meeting with the SE Subgroup, which includes representatives from all affected fisheries. The historical gillnet fisheries in the area affected by the measures, as considered under the original ALWTRP, will be minimally affected. Additionally, the expansion of the Southeast U.S. Restricted Area to waters off South Carolina

will only minimally impact gillnet fishermen because this area is not typically used for gillnet fishing during the time of year covered by the rule. Although the MMC supports the action, this rule does not meet their revised recommendation for further expansion of the restricted area and period. The environmental community and the states of Florida, Georgia, and South Carolina also support the measures.

If we can provide any additional information, please contact Laura Engleby of the Protected Resources Division at (727) 824-5312.

RECOMMENDATION

I recommend that you concur with the attached determinations.

I concur:  5/31/07  
Date

I do not concur: \_\_\_\_\_  
Date

Attachments

## DETERMINATIONS

### Marine Mammal Protection Act (MMPA)

NMFS is taking this action to reduce the risk of serious injury and mortality of right whales from entanglement in commercial gillnet fishing gear. The action will also reduce risk to other large whales included in the ALWTRP, which occur less frequently in Southeast U.S. waters. This action is in response to the January 2006 death of a right whale calf from gillnet gear entanglement and implements existing regulations of the ALWTRP. Revisions to these regulations were developed with input from the Atlantic Large Whale Take Reduction Team's Mid-Atlantic Southeast Subgroup (the SE Subgroup) and the Marine Mammal Commission (MMC). The additional protection provided by the proposed action will further NMFS' ability to accomplish the goals under section 118 of the MMPA, specifically to reduce mortality and serious injury of marine mammals incidental to commercial fishing operations, and to prevent prohibited takes of endangered right whales pursuant to the ESA.

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

A final regulatory flexibility analysis (FRFA) was prepared, as required by section 603 of the RFA, as part of the regulatory impact review of the proposed permanent rule. The FRFA describes the impact this rule will have on small entities. Each of the statutory requirements of section 603 (b) and (c) has been addressed and is summarized in the Classification section of the attached final rule.

E.O. 12866 requires that the Office of Management and Budget (OMB) review proposed regulatory programs that are likely to be "significant." Pursuant to the procedures established to implement section 6 of E.O. 12866, OMB has determined that this rule is not significant.

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. The rule was determined to be "not major" for purposes of 5 U.S.C. 801 *et seq.*

### National Environmental Policy Act (NEPA)

An environmental assessment was prepared for this action, and the FONSI has been signed.

### 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 or its designated critical habitat. 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.

An informal consultation was conducted to evaluate the potential effects of the proposed action on ESA-listed species, as required under section 7 of the ESA. The purpose of this action is to reduce the threat of further serious injury or mortality of right whales due to entanglement in gillnets in the Southeast U.S. Restricted Area. Northern right whales, in particular, will benefit from this action, as the species will be offered additional protection from entanglement in their Florida/Georgia winter calving area. NMFS determined that the proposed action is not likely to adversely affect listed species or designated critical habitat in the action area; rather, it is expected that the action will benefit all listed species in the area by reducing the threat of entanglement from gillnets in the Southeast U.S. Restricted Area.

The final rule differs from the proposed rule only in a slight modification of the northern boundary of the restricted area. This modification does not affect the consultation’s conclusions that implementation of the action is not likely to adversely affect any endangered or threatened species under NMFS’ jurisdiction. The triggers for reinitiation of consultation, identified at 50 CFR 402.16, have not been met, and reinitiation is not required. The Section 7 consultation therefore remains valid for the final rule.

#### Coastal Zone Management Act (CZMA)

NMFS determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of South Carolina, Georgia, and Florida. This determination was submitted on September 21, 2006, for the proposed rule component of the proposed action, and on October 20, 2006, for the emergency rule component of the proposed action, for review by the responsible state agencies under section 307 of the CZMA. NMFS received concurrence from Georgia and Florida, and presumes concurrence from South Carolina in absence of their response within 45 days, as specified at 15 CFR 930.41(c).

#### 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 action does not contain a collection-of-information requirement for purposes of the PRA.

#### Information Quality Act

This action has undergone a pre-dissemination review by the Protected Resources Division of the Southeast Regional Office, completed on March 22, 2007, which determined the action complies with applicable information quality guidelines implementing the Information 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 proposed and emergency rules was identified as EFH through several FMPs. NMFS conducted an EFH consultation and determined that the action will not adversely affect EFH of species managed by NMFS or the South Atlantic Regional Fishery Management Council. No further consultation was required for this final rule.

### Federalism

This rule does not contain policies with federalism implications under E.O. 13132. The Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the action to the appropriate official(s) of the states adjacent to the expanded Southeast U.S. Restricted Area, and received no response.

### Environmental Justice

Executive Order 12898 requires that federal actions address environmental justice in the decision-making process. In particular, the environmental effects of the actions should not have a disproportionate effect on minority and low-income communities. The action is not expected to have a disproportionate effect on minority or low-income communities, as it will affect all gillnet fishermen that fish in the Southeast U.S. Restricted Area, regardless of minority status or income level.

### Executive Order 12630

Executive Order 12630 requires that federal actions address and ensure with due regard for fiscal accountability, the financial impact of the obligations imposed on the Federal Government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution. The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Pursuant to Department of Commerce Takings Guidelines, the action represents a category of actions that does not represent a taking of private property.