

documented facts by the railroad representative responding to the scene.

\* \* \* \* \*

7. In section 219.203, paragraph (d)(2) is amended by revising the first sentence to read as follows:

**§ 219.203 Responsibilities of railroads and employees.**

\* \* \* \* \*

(d) \* \* \*

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood samples after having been acquainted with the requirements of this subpart, the railroad shall immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8802, and FRA at (202) 632-3378, stating the employee's name, the medical facility, its location, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. \* \* \*

\* \* \* \* \*

**§ 219.205 [Amended]**

8. In section 219.205, paragraph (c)(1) is amended by removing the last sentence.

9. In section 219.207, paragraph (b) is revised as follows:

**§ 219.207 Fatality.**

\* \* \* \* \*

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary samples, the railroad shall immediately notify the duty officer at the National Response Center (NRC) at (800) 424-8802 and FRA at (202) 632-3378 by providing the following information:

- (1) Date and location of the accident or incident;
- (2) Railroad;
- (3) Name of the deceased;
- (4) Name and telephone number of custodian of the remains; and
- (5) Name and telephone number of local authority contacted.

\* \* \* \* \*

10. Section 219.207(d) is amended by removing the phrase "and/or" and adding in its place the word "and."

11. In § 219.209, paragraph (a)(1) is amended by revising the second sentence as follows:

**§ 219.209 Reports of tests and refusals.**

(a)(1) \* \* \* Notification shall immediately be provided to the duty officer at the National Response Center (NRC) at (800) 424-8802 and to the Office of Safety, FRA, at (202) 632-3378.

\* \* \* \* \*

**§ 219.303 [Amended]**

12. Section 219.303 is amended by removing and reserving paragraphs (c) through (e).

**§ 219.601 [Amended]**

13. In § 219.601, paragraph (b)(2)(i) is amended by replacing the semi-colon with a period, paragraph (b)(2)(ii) is removed and reserved; and paragraph (b)(2)(iii) is removed.

**§ 219.603 [Corrected]**

14. In § 219.603, "§ 210.102" is corrected to read "§ 219.102".

**§ 219.703 [Amended]**

15. Section 219.703 is amended by removing paragraph (d).

**§ 219.709 [Removed]**

16. Section 219.709 is removed and reserved.

**§ 219.803 [Amended]**

17. Section 219.803(a) is amended by removing the phrase "with more than 400,000" and adding the phrase "that has 400,000 or more" in its place.

**Appendix—B to Part 219 [Amended]**

18. In Appendix B—Designation of Laboratory for Post-Accident Toxicological Testing, the corporate name, address, and telephone number of the designated laboratory is revised to read as follows:

**Appendix—B to Part 219—Designation of Laboratory for Post-Accident Toxicological Testing**

\* \* \* \* \*

NWT Inc., 1141 E. 3900 South, Suite A-110, Salt Lake City, UT 84124, Telephone: (801) 268-2431 (Day), (801) 483-3383 (Night/Weekend).

**PART 240—QUALIFICATIONS FOR LOCOMOTIVE ENGINEERS**

**PART 240—[AMENDED]**

1. The authority citation for Part 240 continues to read as follows:

**Authority:** 49 U.S.C. Chs. 201-213; 49 CFR 1.49.

**§ 240.119 [Amended]**

2. In Section 240.119 amend paragraph (d)(3) by adding the words "alcohol and" before the words "drug tests" and remove paragraphs (d)(4) and (d)(5), and redesignate paragraph (d)(6) as paragraph (d)(4).

Issued in Washington, D.C. on November 20, 1997.

**Jolene M. Molitoris,**

*Administrator, Federal Railroad Administration.*

[FR Doc. 97-31364 Filed 11-28-97; 8:45 am]

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 222**

**Docket No. 97102 1250-7275-02; I.D. 092297E**

**RIN 0648-AK46**

**Endangered Fish or Wildlife; Special Prohibitions; North Atlantic Right Whale Protection**

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

**ACTION:** Final rule; temporary closure of fishery.

**SUMMARY:** NMFS issues this final rule to close the Mid-Atlantic and Northeast Coastal segments of the Atlantic pelagic drift gillnet fishery for swordfish, tuna, and shark through July 31, 1998. The swordfish portion of the Atlantic pelagic drift gillnet fishery has been closed since December 5, 1996, under an emergency Magnuson-Stevens Fishery Conservation and Management Act closure that expires on November 26, 1997. This action is necessary to avoid the likelihood that this fishery will jeopardize the continued existence of the northern right whale (*Eubalaena glacialis*), a species listed as endangered under the Endangered Species Act (ESA), until more long-term regulatory measures are issued.

**DATES:** This closure is effective from 0000 hours, local time, November 27, 1997 through 2400 hours, local time, July 31, 1998. The amendment to 50 CFR 222.34 is effective November 27, 1997 through July 31, 1998.

**ADDRESSES:** Copies of the May 29, 1997, Biological Opinion (BO), the August 29, 1997, amended BO, and an environmental assessment of this action may be obtained from Gregory Silber, Ph.D., Marine Mammal Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Gregory Silber, Ph.D. or Michael Payne,

Office of Protected Resources, (F/PR2), NMFS, 1315 East-West Highway, Silver Spring, MD 20910, 301-713-2322; or by facsimile at 301-713-0376.

**SUPPLEMENTARY INFORMATION:** The Atlantic pelagic fishery (which includes the swordfish, tuna, and shark drift gillnet fishery) is managed by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*) and the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*). Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires an agency to ensure that any agency action is not likely to jeopardize the continued existence of a threatened or endangered species.

One right whale entanglement has been documented in Atlantic pelagic drift gillnet gear. The potential exists for further entanglements in this gear because the geographic distribution of right whales, an endangered species, is close to or overlaps with that of the Atlantic drift gillnet fishery during part of the year.

On May 29, 1997, NMFS issued a BO which concluded that continued operation of the swordfish, tuna, and shark drift gillnet portions of the Atlantic pelagic fishery was likely to jeopardize the continued existence of the northern right whale. This BO identified reasonable and prudent alternatives for the use of drift gillnet gear that would avoid the likelihood of jeopardy for the northern right whale. Identification of these alternatives and a further description of the basis for this action are provided in the notice of proposed rulemaking (62 FR 59335, November 3, 1997).

On August 29, 1997, NMFS issued an amended BO identifying an additional reasonable and prudent alternative which would avoid jeopardy to the northern right whale from the Atlantic pelagic drift gillnet fishery. That alternative is 100-percent observer coverage with expanded time/area closures. The BO issued on August 29, 1997, requires that the driftnet fishery for swordfish, shark, and tunas be prohibited from operating from November 1 to July 31 to avoid jeopardy to northern right whales. NMFS is implementing the time/area closure component of the reasonable and prudent alternative developed through this consultation process.

NMFS, under emergency authority of the Magnuson-Stevens Act, closed the drift gillnet fishery for swordfish in the Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, from December 1, 1996, through May 29,

1997 (61 FR 64486, December 5, 1996). NMFS extended that closure until November 26, 1997 (62 FR 30775, June 5, 1997).

There is not sufficient time to implement the alternatives identified in the BOs under the Magnuson-Stevens Act. Therefore, to provide necessary protection to the northern right whale, NMFS is implementing this measure under the authority of the ESA on a temporary basis pending development and implementation of a long-term management solution for this fishery consistent with alternatives identified in the BOs.

This rule prohibits vessels operating in the North Atlantic off the coast of the United States in waters south and east of the 100 fathom contour from having on board, fishing with, or otherwise possessing or controlling drift gillnet gear from November 1, 1997, through July 31, 1998, except as authorized under 50 CFR 229.32 (regulations implementing the Atlantic Large Whale Take Reduction Plan that allow for restricted drift gillnet operations targeting sharks in the Southeast United States (62 FR 39157, July 22, 1997)).

A final National Environmental Protection Act document analyzing this action has been prepared and is available to interested parties (see ADDRESSES).

This action closes the pelagic driftnet fisheries described in this document and is not intended to close coastal drift gillnet or other gillnet fisheries in Mid-Atlantic or Northeast coastal waters (as defined under 50 CFR 229.2).

#### Comments and Responses

NMFS received three letters of comment in response to the notice of proposed rulemaking.

One letter voiced support for the closure, support for the finding that the fishery may take right whales, and recognized that the closure comports with the southern closure recommended by the Atlantic Offshore Cetacean Take Reduction Team (AOCTRT). The second letter indicated that certain fisheries need to be closed in certain times of the year as part of a comprehensive effort to address the conservation needs of the northern right whale, and suggested that this action helped meet that need. The third letter voiced concerns about the validity and justification for the closure and recommended, for a variety of reasons, that the closure not be implemented. Specific comments and NMFS responses to them follow.

*Comment:* One letter noted that the swordfish stock is weakened, and urged NMFS to assess the impact of condensing the drift gillnet fishery into

one season. In addition, the letter cautioned NMFS about the increase in longline fishing (as a consequence of fishers departing the drift gillnet fishery) and the potential environmental consequences (e.g., increased bycatch) of such a shift.

*Response:* NMFS has considered the impact of drift gillnetters converting to longline gear stated in the draft EA for the AOCTRP. NMFS has concluded that there will be negligible impact from the possible conversion of 15 drift gillnetters on the swordfish stock, while catches of marine mammals will decrease.

*Comment:* Two letters noted that NMFS has not yet implemented an AOCTRP and encouraged NMFS to do so in order to implement effective management of this and other fisheries in accordance with that plan.

*Response:* NMFS regrets that an AOCTRP has yet to be implemented. However, the complexity of the AOCTRT's draft plan, and the costs to the government to implement the draft plan, changes in stock assessments, concerns about impacts on right whales and other considerations have resulted in delays. NMFS has prepared a draft environmental assessment on the implementation of a AOCTRP, and an announcement of availability of the assessment for public comment was issued by NMFS on November 4, 1997 (FR 59657).

*Comment:* One letter indicated that due to NMFS' inability to implement the recommendations of the AOCTRT in a timely manner, further closure of the fishery is not warranted.

*Response:* This closure is necessary to adequately protect northern right whales. Closure of the fishery described in this rule is based on a consultation under section 7(a) of the ESA, not on requirements of the Marine Mammal Protection Act, or the broader marine mammal concerns to be addressed in the AOCTRP. The closure is implementing a reasonable and prudent alternative identified in a BO that resulted from that consultation.

*Comment:* One letter reiterated previous comments on a AOCTRP, in which the commenter recommended restricting fishing activities on Jeffrey's Ledge and the Great South Channel to reduce the possibility of right whale entanglement.

*Response:* As noted above, NMFS is working to implement the AOCTRP, and these and other comments are being considered in that process.

*Comment:* One letter stated that the conclusions of the BO issued on August 29, 1997, are flawed because the risks of a single, additional winter fishing

season are not great, and, therefore, the proposed rule is not justified. Also, because the winter fishery involves only a single vessel, the impacts of allowing this vessel to fish will likely have minimal biological impacts.

*Response:* NMFS cannot predict how many vessels might participate in the winter fishery. As few as one vessel and as many as ten vessels have fished during the winter fishery although in recent years between one and three vessels have participated. The BO considered the potential for participation in the winter fishery in terms of the anticipated quota which is more directly related to the total number of sets than the number of vessels. Although this action is expected to affect a small number of vessels, perhaps only one, the fishery is such that each vessel is capable of putting out 1.5 miles (2.4 km) of net per set and, depending upon when the quota is reached, has the potential for up to an estimated 50 sets. Thus, NMFS believes that the possibility of right whale entanglement exists even in a small fishery.

*Comment:* One letter noted that the closure is not necessary because, in more than 25 years of operation by drift gillnet boats in the Mid-Atlantic swordfish fishery, there has never been a documented right whale encounter in the winter fishery.

*Response:* While no known right whale entanglements have occurred in the Mid-Atlantic portion of the fishery during the winter months for the 16 years for which NMFS has records for the operation of this fishery, one right whale is known to have been entangled in the fishery in July 1993. This indicates that such events do occur with this gear. Also, the timing and the area of observed fishing effort in the Mid-Atlantic during the winter occurs in or near areas of right whale aggregation and in their migration routes. Therefore, the risk associated with fishing in waters off the Mid-Atlantic is higher than fishing elsewhere due to its proximity to the right whale migration route.

In addition, entanglement of large whale species other than right whales has occurred in this fishery. This evidence suggests that there is a risk of interaction with this gear type whenever the distribution of right whales occurs in close proximity to fishing operations.

Photo-identification records indicate that 57 percent of all living right whales bear scars from encounters with fishing gear. It is possible that entanglements of right whales and other large whale species had occurred in this fishery in the past, but went undetected. Observer

coverage for this fishery has ranged from 8 percent in 1989 to 87 percent in 1994. Observers have covered the majority of the fleet only in 1994, 1995, and 1996. Prior to 1994, however, observer coverage of the fishery was less than 50 percent.

*Comment:* One letter stated that if the closure was not in place, the fishery would open in late November, and the fishery would occur further north where the shelf is farther from shore. At that time of year and in that area there are no large concentrations of marine mammals.

*Response:* Historically, the fishery has not opened prior to January 1. Despite the fact that survey effort is low in many areas, right whale sightings have occurred in all months of the year in the waters of the continental shelf off the New England coast. These include sightings near the shelf break in October, November, and December. NMFS has determined that the greatest potential for interactions occurs during from November 1 through July 31, the period of this closure.

*Comment:* One letter underscored the economic hardship on the single vessel owner planning to fish in the winter. Specifically, a fisherman involved in the fishery expected the AOCTRP to be implemented; he outfitted his longline boat for winter drift net fishing and made other arrangements to fish in a fishery he assumed would be open. The same fisherman invested in pingers and was interested in determining if pingers were successful in reducing marine mammal mortality in this fishery.

*Response:* NMFS regrets the economic hardship on fishermen caused by this closure. NMFS' mission is to ensure that endangered species are not jeopardized and some economic consequences may result from management decisions made in pursuit of this mission. NMFS notes that implementation of the draft AOCTRP (something the commenter strongly supports) would likely entail restrictions to the fishery. Therefore, the economic hardship would also have to be endured under that scenario.

NMFS is encouraged by efforts to reduce marine mammal bycatch, including efforts that involve the use of pingers. Pingers have shown some success in reducing entanglement of some marine mammal species, and NMFS is encouraged by the interest in conducting pinger experiments in this fishery. However, the behavior of right whales indicates that they may be less responsive to noise than some other species, and the small sample size makes it difficult to design an experiment that would produce statistically significant results. NMFS

notes that pinger experiments are much more likely to produce significant results with regard to common dolphins where expected interaction are much higher.

Finally, such experimentation would be most beneficial if it had fleet-wide participation. Data from an experiment with a small sample (i.e., one vessel and a relatively few fishing days) are of less value than experiments involving controls (e.g., side-by-side comparisons with gear not equipped with pingers) and replicates. That is, fleet-wide participation is needed to ensure samples adequate for meaningful comparisons and statistical analyses. In this same regard, no experiment has been designed for this fishery or its feasibility tested. Also, pingers are expected to be used in other fisheries, and worthwhile data are likely to come from pinger experiments in those fisheries. The vessel owner may be able to make the pingers he purchased available to participants in one of those fisheries.

*Comment:* The company owning the single active vessel was not notified of the possibility of the closure.

*Response:* NMFS provided notice of the conclusions of the BOs and provided notice of NMFS' intention to close the fishery by publication of the proposed rule. The commenter, the fishing community, and the general public were thereby notified that NMFS is developing a long-range management solution for the fishery.

*Comment:* The fishing community was not notified that two fishing seasons were combined into one by NMFS.

*Response:* In a final rule published in the **Federal Register** on October 24, 1997 (62 FR 55361), establishing regulations on annual quotas for the Atlantic swordfish fishery, NMFS indicated that "[o]n August 29, 1997, an amendment to the BO was issued, which identified a new reasonable and prudent alternative including time/area closures and 100-percent observer coverage. Pending implementation of a modification to the emergency closure, if such is warranted by the preferred option when identified, NMFS has taken action in this final rule to establish a single season quota for the driftnet swordfish fishery."

#### Changes From the Proposed Rule

Based on comments received, there were no substantive changes to the proposed rule. However, the regulatory text of the proposed rule contained an error. While the preamble to the proposed rule clearly stated that the closure would be effective on November

27, 1997, the regulatory text stated that the effective date of the closure would be November 1, 1997. The closure is in effect starting November 27, 1997. This change is reflected in the regulatory text of the final rule.

#### **Classification**

This final rule is necessary to protect the northern right whale in accordance with the requirements of the ESA.

NMFS prepared an EA for this final rule with a finding of no significant impact on the human environment. The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for the Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. No comments were received that changed the basis for the original certification. As a result, no Regulatory Flexibility Analysis has been prepared.

NMFS has determined that this rule will be implemented in a manner that is consistent, to the maximum extent practicable, with the coastal zone management programs of the Atlantic and Gulf of Mexico states that have approved programs. This determination was submitted for review by the responsible agencies under section 307 of the Coastal Zone Management Act.

As noted above, this rule implements an alternative identified in a BO, and is necessary to avoid jeopardy to the northern right whale. Therefore, failure to implement the closure identified in this action expeditiously would be contrary to the public's interest. Also as noted above, the swordfish portion of the Atlantic pelagic drift gillnet fishery

has been closed since December 5, 1996, under an emergency Magnuson-Stevens Fishery Conservation and Management Act closure. Thus, this portion of the fishery has not been active since that time. This action would have no impact on drift gillnetters directly fishing for sharks in the Southeast because participants in the directed shark fishery are covered by regulations implementing the Atlantic Large Whale Take Reduction Plan and would not be further restricted by this action. In addition, the fishery for large coastal sharks was closed on July 21, 1997, through December 31, 1997, because that fishery reached its allowable quota (62 FR 32942, July 21, 1997). Based on recent records and the lack of requests for observer coverage as required under the Marine Mammal Protection Act, there is no history of a directed gillnet fishery for tunas in the winter and early summer. NMFS will rapidly communicate the dates of this closure to fishing interests through the FAX network and NOAA weather radio. Accordingly, the Assistant Administrator for Fisheries finds good cause, under 5 U.S.C. 553(d)(3), to waive the 30-day delay in the effective date normally required by section 553(d) of the Administrative Procedures Act.

This rule does not contain policies with federalism implications to warrant preparation of a federalism assessment under Executive Order 12612. In addition, this rule does not contain new collection-of-information requirements subject to the Paperwork Reduction Act.

This final rule has been determined to be not significant for purposes of E.O. 12866.

#### **List of Subjects in 50 CFR Part 222**

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**David L. Evans,**

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

For the reasons set forth in the preamble, 50 CFR Part 222 is amended as follows:

#### **PART 222—ENDANGERED FISH OR WILDLIFE**

1. The authority citation for part 222 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543; subpart D, § 222.32 also issued under 16 U.S.C. *et seq.*

2. In subpart D, a new § 222.34 is added to read as follows:

##### **§ 222.34 Restrictions on taking right whales incidental to fishery operations.**

From November 27, 1997, through July 31, 1998, it is unlawful for any person or vessel subject to the jurisdiction of the United States to have on board a vessel, to fish with, or otherwise to possess or control drift gillnet gear, as defined in 50 CFR 229.2, in the North Atlantic Ocean in waters off the coast of the eastern United States south and east of the 100 fathom contour except that such gear may be used in southeast waters, as defined under 50 CFR 229.2, if that gear is used in compliance with the requirements of 50 CFR 229.32(f).

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