

Section	Remove	Add
378.5(b)	§ 1008.9	§ 378.9.
378.5(c)	§ 1008.8	§ 378.8.
378.6	§ 1008.7	§ 378.7.

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DEPARTMENT OF COMMERCE

50 CFR Part 648

National Oceanic and Atmospheric Administration

[Docket No. 970324064-7064-01; I.D. 021997B]

RIN 0648-AJ32

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 23

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement measures contained in Framework Adjustment 23 to the Northeast Multispecies Fishery Management Plan (FMP). This rule closes Federal waters at the times specified to vessels fishing with sink gillnet gear and other gillnet gear capable of catching multispecies, with the exception of single pelagic gillnets, in parts of the following right whale critical habitat areas: Cape Cod Bay from March 27, 1997 through May 15, 1997, and from January 1 through May 15 in subsequent years; and the Great South Channel from April 1 through June 30, annually. The intent of this action is to restrict multispecies fishing activities that have been determined to jeopardize the continued existence of the northern right whale.

EFFECTIVE DATE: March 27, 1997.

ADDRESSES: Copies of Amendment 7 to the FMP, its regulatory impact review (RIR) and the final regulatory flexibility analysis (FRFA) contained with the RIR, and its final supplemental environmental impact statement, are available upon request from Paul Howard, Executive Director, New England Fishery Management Council (Council), 5 Broadway, Saugus, MA 01906-1097. Framework Adjustment 23 documents, the marine mammal stock assessment report, and biological opinions are available from Andrew A. Rosenberg, Ph.D, Regional Administrator, Northeast Region, NMFS

(Regional Administrator), One Blackburn Drive, Gloucester, MA 01930-2298.

FOR FURTHER INFORMATION CONTACT: Lt. Dan Morris (NOAA Corps), Resource Conservation Officer, NMFS, Northeast Region, Habitat and Protected Resources Division, 508-281-9388.

SUPPLEMENTARY INFORMATION:

Background

Several marine species listed as threatened or endangered under the Endangered Species Act (ESA) occur regularly in waters covered by the FMP. The NMFS, the agency responsible for implementation of the FMP, is required by section 7 of the ESA to consider what impacts fishing activities governed by the FMP and its implementing regulations may have on ESA-listed species. As a result of this deliberative process, NMFS issued a biological opinion¹ on December 13, 1996, concluding that the fishing activities governed by the FMP and its implementing regulations are likely to jeopardize the continued existence of the northern right whale (*Eubalaena glacialis*).

The northern right whale is the most endangered large whale species in the Northwest Atlantic Ocean. The 1995 Stock Assessment Report (Blaylock *et al.*, 1995) prepared by NMFS pursuant to the 1994 Marine Mammal Protection Act amendments reference the 1992 estimate of 295 (Knowlton *et al.*, 1994) as the current minimum population estimate for the northern right whale.

The Potential Biological Removal (PBR) level is the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing the stock to reach and or sustain its optimum sustainable population level. The PBR level for right whales is currently set at 0.4 individuals per year, or two human-induced whale mortalities or serious injuries every 5 years (Blaylock *et al.*, 1995). Based on a minimum estimate of known serious injuries or mortalities, the current PBR level has been exceeded in 20 of the

¹ See National Marine Fisheries Service Biological Opinion, issued on November 30, 1993, relating to Amendment 5 of the Multispecies FMP, for a discussion of the abundance, distribution, and life history of right whales, along with a discussion of factors contributing to the mortality of right whales, including entanglements with sink gillnet gear and other gillnet gear capable of catching multispecies.

past 27 years. This level of interaction is based on actual reported numbers, rather than an estimate based on extrapolations to total shipping and fishing effort.

During January and February of 1996, an unprecedented number of right whale deaths (six or seven) was reported from the Southeast right whale critical habitat/calving grounds off Georgia and Florida. Because the northern right whale population is so small and its reproductive rate so low, anthropogenic impacts, such as ship strikes and fishery entanglements, inhibit the species' recovery and may jeopardize the population's continued existence. A report on these mortalities was presented by the Right Whale Research Group of the New England Aquarium to the New England and Southeast Right and Humpback Whale Recovery Plan Implementation Teams along with information from 1995 and 1996 on levels of known and estimated right whale mortality. This information reflected a possible change in the status of the species, as measured by the environmental baseline upon which all previous section 7 consultations had been conducted. Based on this new information, NMFS reinitiated consultation on the FMP on October 29, 1996.

The multispecies fishery includes the use of sink gillnets, a gear type that is known to cause serious injury to right whales. Approximately 15 right whale entanglements in gillnet gear were recorded between 1970 and 1996; approximately 13 were sighted in Massachusetts, the Great South Channel, the Bay of Fundy, and the Gulf of Maine combined; and 5 were identified as monofilament or sink gillnet gear. Given the historical record of right whale entanglements in gillnet gear, the level of observed right whale mortalities over the past 18 months from all sources (including ship strikes, fishery interactions and natural causes), and the uncertainties about the status of the population and its rate of recovery, NMFS, on December 13, 1996, concluded that the current and proposed fishing activities carried out under the FMP are likely to jeopardize the continued existence of the northern right whale.

When NMFS concludes that a Federal action is likely to jeopardize the continued existence of a species, the

agency is required to recommend reasonable and prudent alternative(s) to the action which, when implemented, would remove the threat of jeopardy to the species in question. The reasonable and prudent alternative in the Multispecies FMP Biological Opinion (December 13, 1996) includes the requirement that NMFS request the Council to accomplish a framework adjustment action to close most of the Great South Channel right whale critical habitat to sink gillnet gear and other gillnet gear capable of catching multispecies, with the exception of single pelagic gillnets, used in the bait fishery, during the period of peak right whale abundance. NMFS made this request to the Council at the December 11-12, 1996, meeting in order to allow the action to be completed under the framework adjustment process prior to April 1, 1997, the deadline required by the biological opinion.

Concurrently, the Commonwealth of Massachusetts has prohibited gillnets from the designated right whale critical habitat in Cape Cod Bay within State waters from January 1 through May 15. As a portion of the Cape Cod Bay Critical Habitat lies in Federal waters, NMFS has requested that the Council act to implement restrictions consistent with the State's in that Federal area, as well.

Implemented fully and in a timely manner, this measure will directly reduce the likelihood of right whale entanglements in sink gillnet gear and other gillnet gear capable of catching multispecies. The exception for single pelagic gillnets (sometimes referred to as a small-mesh pelagic net or baitnet by participants in the fishery) provides for the use of this gear to harvest bait for the tuna and lobster fisheries. Framework Adjustment 16 to the FMP (62 FR 9377, March 3, 1997) referred to these single pelagic nets as small-mesh pelagic gillnets, not longer than 300 ft (91.44 m) and not more than 6 ft (1.83 m) deep, with a maximum mesh size of 3 inches (7.62 cm), and requires that the net be attached to the boat and fished in the upper two-thirds of the water column. These small nets are constantly monitored and should pose little risk of entanglement to right whales. If a whale should become entangled in a legally deployed baitnet, disentanglement efforts should begin immediately to minimize the threat of the whale becoming injured seriously or killed. Accordingly, these final regulations are applicable to all sink gillnets and other gillnet gear capable of catching multispecies, except for single pelagic gillnets as described in § 648.81(f)(2)(ii). In addition, gillnet gear modifications

may be developed that would minimize the risk of whale entanglement and/or minimize the chances that an entanglement will result in the serious injury or mortality of a whale. If such gear modifications are determined to represent an acceptable risk, the Regional Administrator may authorize an experimental fishery in the time/area closures under this action. Since the northern right whale is an endangered species, the efficacy of proposed gear modifications cannot be directly tested. Therefore, before implementation through an experimental fishery, proposed gear modifications must be subjected to rigorous technical review for practicability and potential effectiveness. The process by which proposed gear modifications will undergo technical review for potential effectiveness and practicability is as follows:

- Ideas for gear modifications will be sought from the fishing industry, gear specialists, the academic community, and conservation organizations.
- Gear modification proposals will be reviewed and refined by the Gear Modification Development Group. Among others, the Group will include a core of engineers or other specialists who can provide detailed technical review of proposals.
- The Gear Modification Development Group will forward acceptable proposals to the Council's Marine Mammal Committee and/or responsible fisheries committee for its consideration.
- The Committee(s) will report to the full Council, and the Council will recommend to the NMFS Regional Administrator what gear modifications should be implemented as an experimental fishery in the closed areas. The Regional Administrator will decide within 60 days whether to authorize the experimental fishery under the Magnuson-Stevens Fishery Conservation and Management Act.

The Council is making this adjustment to the regulations under the framework abbreviated rulemaking procedure codified at 50 CFR part 648, subpart F. This procedure requires the Council, when making specifically allowed adjustments to the FMP, to develop and analyze the actions over the span of at least two Council meetings. The Council must provide the public with advance notice of both the proposals and the analysis, and opportunity to comment on them prior to and at a second Council meeting. Upon review of the analysis and public comment, the Council may recommend to the Regional Administrator that the measures be published as a final rule, if

certain conditions are met. The Regional Administrator may publish the measures as a final rule, or as a proposed rule if additional public comment is needed.

Adherence to Framework Procedure Requirements

The Council considered the public comments prior to making its recommendation to the Regional Administrator under the provisions for abbreviated rulemaking in this FMP. The Council requested publication of these management measures as a final rule after considering the required factors stipulated under the framework measures in the FMP, 50 CFR 648.90, and has provided supporting analyses for each factor considered. NMFS concurs with the Council's analysis.

Comments and Responses

NMFS requested that the Council initiate action on Framework Adjustment 23 at its meeting on December 11-12, 1996. The proposed action was discussed by the Council at that meeting and both the Council and the public had the opportunity to comment at the next two Council meetings (the minimum required under the FMP framework adjustment process). The first meeting was held on January 16, 1997, and the second meeting took place on January 29-30, 1997. Both Council meetings were held in Danvers, MA. Documents summarizing the Council's proposed action, the biological analyses upon which this decision was based and potential economic impacts were available for public review 5 days prior to the second meeting as required under the framework adjustment process. Written comments were accepted through January 30, 1997. Comments on the Council's proposal were received from a Council member, the International Wildlife Coalition and Massachusetts Gillnetters Association.

Comment 1: NMFS, in several forums and documents, has stated that fishery entanglements are the known cause of a relatively small portion of the observed right whale mortalities and that entanglement in sink gillnet gear from a U.S. fisher has never been identified as cause of a right whale's death.

Response: Of the 41 right whale mortalities observed since 1970 (New England Aquarium, unpublished data), 2 have been attributed to fishery entanglements and 14 have been attributed to ship strikes. The remainder of the mortalities are from unknown or natural causes. Since 1970, there was a total of approximately 31 records of right whale entanglements in all types

of commercial fishing gear that did not result in immediate mortality (NMFS, unpublished data). Although the gear type often cannot be attributed to a specific fishery, gear types that have been identified include a weir, traps, several types of nets, and pot/trap gear. As the gear is often unmarked and the entangled whales can carry it for hundreds of miles, the country of origin cannot always be determined.

Furthermore, entanglement in sink gillnet gear has been documented in Canadian waters. Because this same gear type is used by U.S. fishers in right whale high-use areas, there is a potential for entanglement in U.S. gillnet gear.

Comment 2: Ship strikes are a far greater source of mortality, yet the U.S. sink gillnet fishery is held responsible and restricted to reduce mortalities. Gillnetters have been singled out as the single culprit of a multi-faceted problem. Such an approach is illogical, unconscionable, and probably ineffective.

Response: Recovery of the right whale population is a multi-faceted problem involving the many water-borne activities that may affect the whales. It is certain that ship strikes present a significant threat to right whales. NMFS is aggressively working with the shipping community on the problem. A sighting and reporting network has been established to warn vessel traffic of the presence of whales in high use areas. Other outreach programs are being developed; for example, NMFS is helping to support a workshop on the problem for all components of the shipping industry. The Commonwealth of Massachusetts, U.S. Navy, U.S. Coast Guard, NMFS, and the Center for Coastal Studies have provided resources for sighting and outreach efforts. Also, NMFS recently issued an interim final rule that prohibits vessels from approaching right whales to within 500 yd (460 m) (62 FR 6729, February 13, 1997).

As noted above, right whales are known to have become entangled in gear types other than multispecies gillnet gear. Under separate authority, NMFS intends to place restrictions on the lobster trap/pot fishery (along with provisions for experimental fisheries with approved gear modifications) similar to those imposed on the multispecies gillnet fishery by this action. NMFS is not considering the impacts of the sink gillnet fishery in isolation, but in combination with impacts of other activities.

Comment 3: The proposed action allows fishing to continue in the portion of the designated Great South Channel

Critical Habitat to the west of LORAN C 13710. While this regulation may limit the potential for increased interaction between right whales and gillnets within the critical habitat, the current lack of fishery activity within the time and area of the proposed action results in little or no reduction in the potential for entanglement. Therefore, the proposed action is unlikely to meet its objective. The entire critical habitat should be closed from April through June of each year.

Response: Of all the right whale sightings in the Great South Channel Critical Habitat from April through June, 97 percent have been in the area to the east of LORAN C 13710 (Dr. James Hain, NEFSC, report to the Large Whale Take Reduction Team). This action removes sink gillnets and other gillnet gear capable of catching multispecies finfishes, with the exception of a single pelagic gillnet (as described in § 648.81(f)(2)(ii)), from this area and accordingly, could reduce the likelihood of a right whale becoming entangled in a gillnet in the critical habitat area by 97 percent. Arguably, the closure of the entire critical habitat area would affect more fishers more significantly than the proposed action and may provide considerable incentive for the industry to develop and operationally test a range of methods and gear modifications. On the other hand, the broader closure would not offer any significant additional risk reduction while impacting a significantly larger number of fishing vessels that utilize the western portion of the critical habitat area in the spring.

Comment 4: Under the action, experimental fisheries may be authorized in the closed areas if gear modifications are developed that would reduce the risks of entanglement and/or minimize the injurious effect of potential entanglements. To ensure timely and consistent review of proposed gear modifications, NMFS needs to establish a technical review process.

Response: NMFS has developed a process for review and development of gear modifications that would potentially minimize the risks of right whale entanglements. The process would establish first a Gear Modification Development Group, consisting of a core of engineers and gear specialists, which would solicit, review for potential effectiveness and practicability, and provide technical advice on gear modification proposals from the fishing industry, academic community, conservation organizations, and the general public. Next, under the process, the Gear Modification

Development Group would report its findings to the Marine Mammal Committee and/or Responsible Fisheries Committee of the Council for their consideration. The Committees would then report to the full Council, and the Council would recommend to the Regional Administrator what acceptable gear modifications should be implemented as an experimental fishery or other appropriate measures in the closed areas.

Comment 5: NMFS should initiate and/or finance the development of gear modifications.

Response: The financing of gear development is being considered by NMFS. Presently, no funds are earmarked for this purpose.

Classification

Because prior notice and opportunity for comment are not required for this regulation by 5 U.S.C. 553 or by any other law, under 5 U.S.C. 603 and 604, preparation of an initial or final regulatory flexibility analysis is not required by the Regulatory Flexibility Act and none has been prepared.

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

The Assistant Administrator for Fisheries, NOAA (AA) finds there is good cause to waive prior notice and opportunity for public comment under 5 U.S.C. 553(b)(B) of the Administrative Procedure Act (APA). Public meetings held by the Council to discuss the management measures implemented by this rule provided adequate prior notice and an opportunity for public comment to be heard and considered. The AA finds that under 5 U.S.C. 553(d), the need to have this regulation in place by April 1, 1997, is good cause to waive the 30-day delay in effectiveness of this regulation. Delay of implementation of this regulation beyond April 1, 1997, would likely jeopardize the continued existence of northern right whales.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 26, 1997.

Rolland A. Schmitten,

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

For the reasons set out in the preamble, 50 CFR part 648 is amended to read as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. Section 648.14(a)(89) is revised to read as follows:

§ 648.14 Prohibitions.

(a) * * *
 (89) Fail to remove, use, set, haul back, fish with, or possess on board a vessel, unless stowed in accordance with § 648.81(e)(4), sink gillnet gear and other gillnet gear capable of catching multispecies, with the exception of single pelagic gillnets (as described in § 648.81(f)(2)(ii)), in the areas and for the times specified in § 648.87 (a) and (b), except as provided in §§ 648.81(f)(2)(ii) and 648.87 (a) and (b), or unless otherwise authorized in writing by the Regional Director.

* * * * *

3. Section 648.87 is amended by revising the section heading and paragraph (a) and paragraph (b) to read as follows:

§ 648.87 Gillnet requirements to reduce or prevent marine mammal takes.

(a) *Areas closed to gillnet gear capable of catching multispecies to reduce harbor porpoise takes.* Sections 648.81 (f) through (h) set forth closed area restrictions to reduce the take of harbor porpoise consistent with the harbor porpoise mortality reduction goals. Further, all persons owning or operating vessels in the EEZ portion of the areas and times specified in paragraphs (a) (1) and (2) of this section must remove all of their sink gillnet gear and other gillnet gear capable of catching multispecies, with the exception of single pelagic gillnets (as described in § 648.81(f)(2)(ii)), and may not use, set, haul back, fish with, or possess on board, unless stowed in accordance with the requirements of § 648.81(e)(4), sink gillnet gear or other gillnet gear capable of catching multispecies, with the exception of single pelagic gillnet gear (as described in § 648.81(f)(2)(ii)) in the EEZ portion of the areas and for the times specified in paragraphs (a) (1) and (2) of this section. Also, all persons owning or operating vessels issued a limited access multispecies permit must remove all of their sink gillnet gear and other gillnet gear capable of catching multispecies, with the exception of single pelagic gillnets (as described in § 648.81(f)(2)(ii)), from the areas and for the times specified in paragraphs (a) (1) and (2) of this section, and, may not use, set, haul back, fish with, or possess on board, unless stowed in accordance with the requirements of § 648.81(e)(4),

sink gillnets or other gillnet gear capable of catching multispecies, with the exception of single pelagic gillnets (as described in § 648.81(f)(2)(ii)) in the areas and for the times specified in paragraphs (a) (1) and (2) of this section.

(1) *Mid-coast Closure Area.* (i) From March 25 through April 25 and from September 15 through December 31 of each fishing year, the restrictions and requirements specified in paragraph (a) of this section apply to the Mid-coast Closure Area, as defined under § 648.81(g)(1), except as provided in paragraph (a)(1)(ii) of this section.

(ii) Vessels subject to the restrictions and regulations specified in paragraph (a) of this section may fish in the Mid-coast Closure Area, as defined under § 648.81(g)(1), from November 1 through December 31 of each fishing year, provided that an acoustic deterrent device ("pinger") is attached at the end of each string of nets and at the bridle of every net within a string of nets, and is maintained as operational and functioning. Each pinger, when immersed in water, must broadcast a 10kHz +/- 2kHz sound at 132 dB +/- 4dB re 1 micropascal at 1 m. This sound must last 300 milliseconds and repeat every 4 seconds.

(2) *Cape Cod South Closure Area.* From March 1 through March 30 of each fishing year, the restrictions and requirements specified in paragraph (a) of this section apply to the Cape Cod South Closure Area (copies of a chart depicting this area are available from the Regional Director upon request), which is the area bounded by straight lines connecting the following points in the order stated.

CAPE COD SOUTH CLOSURE AREA

Point	N. Latitude	W. Longitude
CCS1	(1)	71°45' W
CCS2	40°40' N	71°45' W
CCS3	40°40' N	70°30' W
CCS4	(2)	70°30' W

¹ RI Shoreline.
² MA Shoreline.

(b) *Areas closed to gillnet gear capable of catching multispecies to prevent right whale takes.* All persons owning or operating vessels must remove all of their sink gillnet gear and gillnet gear capable of catching multispecies, with the exception of single pelagic gillnets (as described in § 648.81(f)(2)(ii)), from the EEZ portion of the areas and for the times specified

in (b) (1) and (2) of this section, and may not use, set, haul back, fish with, or possess on board, unless stowed in accordance with the requirements of § 648.81(e)(4), sink gillnet gear or gillnet gear capable of catching multispecies, with the exception of single pelagic gillnet gear (as described in § 648.81(f)(2)(ii)) in the EEZ portion of the areas and for the times specified in paragraphs (b) (1) and (2) of this section.

(1) *Cape Cod Bay Critical Habitat Closure Area.* From March 27, 1997 through May 15, 1997 and from January 1 through May 15 of each subsequent year, the restrictions and requirements specified in paragraph (b) of this section apply to the Cape Cod Bay Critical Habitat Closure Area (copies of a chart depicting this area are available from the Regional Director upon request), which is the area bounded by straight lines connecting the following points in the order stated.

CAPE COD BAY CRITICAL HABITAT CLOSURE AREA

Point	N. Latitude	W. Longitude
CCB1	42°12' N	70°30' W
CCB2	42°12' N	70°15' W
CCB3	42°08' N	70°12.4' W
Then westerly along the 3 NM state boundary to		
CCB4	42°08' N	70°30' W
Then due north to CCB1.		

(2) *Great South Channel Critical Habitat Closure Area.* From April 1 through June 30 of each year, the restrictions and requirements specified in paragraph (b) of this section apply to the Great South Channel Critical Habitat Closure Area (copies of a chart depicting this area are available from the Regional Director upon request), which is the area bounded by straight lines connecting the following points in the order stated.

GREAT SOUTH CHANNEL CRITICAL HABITAT CLOSURE AREA

Point	N. Latitude	W. Longitude
GSC1	41°02.2' N	69°02' W
GSC2	41°43.5' N	69°36.3' W
GSC3	42°10' N	68°31' W
GSC4	41°38' N	68°13' W

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