

of each side of the square or rectangle formed by the intersecting chains is less than or equal to 14 inches (35.5 cm). The chains must be connected to each other with a shackle or link at each intersection point. The measurement must be taken along the chain, with the chain held taut, and include one shackle or link at the intersection point and all links in the chain up to, but excluding, the shackle or link at the other intersection point.

(ii) Any vessel that harvests sea scallops in or from the waters described in (d)(11)(i) and that is required to have a Federal Atlantic sea scallop fishery permit must have the chain mat configuration installed on all dredges for the duration of the trip.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 061107293-6293-01; I.D. 103006B]

RIN 0648-AU95

#### Right Whale Protection; Southeast U.S. Gillnet Closure

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

**ACTION:** Emergency rule.

**SUMMARY:** NMFS is prohibiting gillnet fishing or gillnet possession in Atlantic Ocean waters west of 80°00' W. long. between 29°00' N. lat. (just south of New Smyrna Beach, Fla.) and 32°00' N. lat. (the approximate state boundary between Georgia and South Carolina) and within 35 nautical miles of the South Carolina coast. An exemption to the prohibition on the possession of gillnet gear is provided for transiting through this area if gear is stowed in accordance with this rule. NMFS is taking this action to prevent a significant risk to the well being of endangered right whales from entanglement in gillnet gear in the core right whale calving area during the calving season.

**DATES:** This action is effective November 15, 2006 through April 15, 2007.

**ADDRESSES:** Copies of the Environmental Assessment (EA) prepared in association with this emergency rule may be obtained from

the persons listed below under the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Laura Engleby, 727-551-5791, Barb Zoodsma, 904-321-2806, or Nancy Young, 727-551-5607.

Electronic Access: Background documents, including the EA may be downloaded at <http://sero.nmfs.noaa.gov/>

#### SUPPLEMENTARY INFORMATION:

##### Background

The northern right whale (*Eubalaena glacialis*) was severely depleted by commercial whaling, and despite protection from commercial harvest since 1935 has not recovered. The North Atlantic population is believed to be as few as 300 individuals, making it one of the most imperiled of the endangered large whale populations in the world (NMFS 2005). Deaths from human related activities are believed to be the principal reason for a declining adult survival rate (Caswell *et al.*, 1999) and the lack of recovery in the species. From 1999 to 2003, human-caused mortality and serious injury to northern right whales in the North Atlantic from fishery entanglements and ship strikes were estimated as an average of 2.6 whales per year (Waring *et al.*, 2006). Fraus *et al.* (2005) indicated that the overall mortality rate for North Atlantic right whales increased between 1980 and 1998 to a level of at least four percent per year, a rate that is not sustainable. From 1999-2003, Waring *et al.* (2006) documented 31 reports of entanglements in commercial fishing gear that resulted in 5 serious injuries and 3 mortalities, for an average of 1.6 mortalities and serious injuries per year over that time period.

The northern right whale has been listed as endangered under the Endangered Species Act (ESA) since the ESA's passage in 1973 (35 FR 8495, June 2, 1970). In June 1994, NMFS designated three areas of the right whale's Atlantic range in the United States as critical habitat: (1) Great South Channel, (2) Cape Cod Bay, and (3) the southeastern U.S. (59 FR 28793, June 3, 1994). The southeastern U.S. critical habitat includes coastal waters between 31°15' N. lat. and 30°15' N. lat. from the coast out 15 nautical miles (27.8 km), and the coastal waters between 30°15' N. lat. and 28°00' N. lat. from the coast out 5 nautical miles (9.3 km) (§ 226.203 of this chapter). Coastal Atlantic waters off the southeastern U.S. are the North Atlantic right whale's only known and likely only calving grounds. During the winter calving season, these waters support the entire population's calving

females and their calves, plus, in some years, a large proportion of the remainder of the population.

As required by ESA section 4(f)(1), NMFS developed a recovery plan for the northern right whale in 1991, which was revised and updated in 2001 and 2005. The current recovery plan states, "the most immediate need for the North Atlantic right whale is to reduce or eliminate human-related deaths and injuries" and that "direct and indirect impacts from human activities -mostly in the form of vessel collisions and entanglement in fishing gear -almost certainly have contributed to a lack of recovery in the North Atlantic. Action is urgently needed to reduce the frequency of collisions with ships and fishing gear entanglements, and thus to improve the survival of right whales" (NMFS 2005). Therefore, the development and implementation of strategies to modify fishing operations and gear to reduce the likelihood of entanglement, mitigate the effect of entanglements, enhance the possibility of disentanglement, and assess the effectiveness of such strategies is a priority one recovery task, i.e., an action that must be taken to prevent extinction or to prevent the species from declining irreversibly (NMFS 2005).

To date, NMFS has been working to address right whale serious injury and mortality in commercial fishing gear primarily through its authority under the Marine Mammal Protection Act (MMPA). Pursuant to MMPA section 118, NMFS has developed an Atlantic Large Whale Take Reduction Plan (ALWTRP) and implementing regulations (§ 229.32 of this chapter) to reduce serious injury and mortality of right whales resulting from commercial fisheries including gillnet fisheries.

The ESA provides authority to NMFS for multiple mechanisms to achieve the Act's overall purpose of conserving threatened and endangered species. Section 4(b)(7) of the ESA (16 U.S.C. 1533(b)(7)) authorizes NMFS to issue regulations, not subject to notice and comment, regarding emergencies posing a significant risk to the well-being of listed species. Such regulations may take effect immediately upon publication in the **Federal Register** and may be effective up to 240 days.

#### Recent Events

On January 22, 2006, a dead right whale calf was found floating off Jacksonville Beach, Florida. The calf was necropsied by a specialized large whale necropsy team and evidence of recent entanglement in gillnet gear was clearly documented. NMFS determined, based on best available information and

discussions with scientific investigators, that the right whale's entanglement in gillnet gear ultimately led to the death of the animal. As a result of these findings, NMFS enacted temporary restrictions on gillnet fishing from February 15, 2006, through March 31, 2006 (71 FR 8223, February 16, 2006), in accordance with the ALWTRP's implementing regulations at 50 CFR 229.32(g)(1). The emergency regulation was necessary to protect right whales from further serious injury or mortality due to entanglement in gillnet gear.

NMFS then collected and analyzed additional information to determine the scope of permanent protective measures as required by the regulations. As part of this process, NMFS convened a meeting of the Atlantic Large Whale Take Reduction Team's Mid-Atlantic/Southeast Subgroup to seek input regarding future management options to protect right whales from additional serious injury and mortality from gillnetting. As a result, NMFS has prepared and published a Notice of Proposed Rulemaking (RIN 0648-AU90) pertaining to gillnet fishing and right whale protection in the southeast U.S. in the "Proposed Rules" section of today's **Federal Register** and is seeking public comment.

**Significant Risk to the Right Whales' Well-Being**

A review of the Right Whale Sightings Database, curated by the University of Rhode Island, indicates that the vast majority of right whale mother/calf pairs have been observed along Florida, Georgia, and South Carolina. Right whale mother/calf pairs off Florida and Georgia have been typically observed in waters west of 80°00' W long. Right whales have been visually (McLellan *et al.*, 2001, Glass *et al.*, 2005) and acoustically (Clark, 2006) detected in waters up to 30 miles offshore of South Carolina. Predictive models, based on aerial survey data collected off Florida and Georgia, suggest a strong relationship between the spatial distribution of calving right whales and water temperature and bathymetry. Suitable environmental conditions for calving right whales are typically found off South Carolina during winter months to distances of 35 nautical miles (64.8 km). Right whales occur in the area from South Carolina to Florida, north of 29°00' N lat., from mid-November through mid-April. Right whale mother/calf pairs have been observed south of 29°00' N lat., but in this area are often found close to shore, in Florida state waters, where state regulations prohibit gillnet fishing.

In 2004, a small group of gillnet fishermen targeting whiting began using the area off Jacksonville, Florida, near the location where the entangled, dead right whale calf was first reported in January 2006. These fishermen use large amounts of net with long soak times, and individual nets are left untended, either overnight or while other nets are being fished. Recently, NMFS has learned of the expressed intent of fishermen to target whiting with gillnets off Jacksonville, Florida, until such activity is prohibited. NMFS has also been alerted to the presence of additional shark gillnet fishermen that are working out of Fernandina Beach, Florida, and Daytona, Florida. Because of this expansion of effort and new method of gillnet fishing in the Southeast Atlantic, the new information on shark gillnetting effort, and the documented mortality of a right whale calf as a result of entanglement in gillnet fishing gear, NMFS is concerned that there is substantial risk of additional gillnet entanglements and resultant serious injury or mortality when right whales return to their southeast calving grounds this year. Because of the critical status of endangered right whales, the vulnerability of mothers and calves, and the negative impact any additional human-caused mortality would have on the species' ability to survive and recover, NMFS believes that continued gillnet fishing as currently practiced in the southeast calving grounds constitutes a significant risk to the well-being of endangered right whales.

NMFS is publishing a proposed rule in this **Federal Register**, which would address, on a long-term basis, the risk to right whales from the increase in gillnet effort in the right whale's only known calving area. NMFS intends to ensure full public participation, seek comments, and evaluate possible exemptions to a complete gillnet closure, before finalizing any permanent rule. Because of this process, a permanent rule is not likely to be in effect until early 2007. However, right whales are expected to begin arriving in the core calving area November 15. Therefore, to ensure adequate protection for right whales, particularly mothers and calves during the calving season, from gillnet fishing in the calving area that NMFS believes poses a significant risk to the well-being of right whales, NMFS is implementing this emergency rule.

**Prohibition on Gillnet Fishing and Possession**

Pursuant to 16 U.S.C. 1533(4)(b)(7), NMFS has determined that continued gillnet fishing activity in the core right

whale calving area during the calving season constitutes a significant risk to the well-being of endangered right whales. NMFS has determined that this emergency rule prohibiting gillnet fishing and possession in the core calving area is necessary to prevent additional takes of right whales until a final, permanent rule can be implemented.

NMFS has determined that the core right whale calving area requiring emergency gillnet prohibitions is the Atlantic Ocean waters west of 80°00' W. longitude between 29°00' N. lat. (just south of New Smyrna Beach, Fla.) and 32°00' N. lat. (the area of the state boundary between Georgia and South Carolina) and the Atlantic Ocean waters within 35 nautical miles of the South Carolina coast. This area is specifically defined as the area bounded by straight lines connecting the following points in the order stated from south to north.

Point	N. Lat.	W. Long.
SE1	29°00'	(1)
SE2	29°00'	80°00'
SE3	32°00'	80°00'
SE4	32°36'	78°52'
SE5	32°51'	78°36'
SE6	33°15'	78°24'
SE7	33°27'	78°04'
SE8	(2)	(2)

<sup>1</sup>Florida shoreline  
<sup>2</sup>Shoreline at South Carolina/North Carolina state border.

Specifically, this emergency rule prohibits fishing with or possessing gillnet in the core right whale calving area as defined above from November 15, 2006, through April 15, 2007; the Right Whale Sightings Database, curated by the University of Rhode Island, indicates that the vast majority of right whale sightings in their core calving area occur between November 15 and April 15. Possession of gillnet aboard a vessel in transit through this core area is exempt from the restrictions if: All nets are covered with canvas or other similar material and lashed or otherwise securely fastened to the deck, rail, or drum; and all buoys, high flyers, and anchors are disconnected from all gillnets. No fish may be possessed aboard such a vessel in transit. This emergency rule is in effect from 0001, hours November 15, 2006, through 2400, hours April 15, 2007, or until the proposed rule pertaining to gillnet fishing and right whale protection becomes effective through the publication of a final rule or is withdrawn.

Fisheries expected to be affected by this rulemaking include the Southeastern U.S. Atlantic shark gillnet

fishery and the Southeast Atlantic gillnet fishery as described in the current MMPA List of Fisheries (71 FR 48802, August 22, 2006). NMFS believes there are approximately six to eight active vessels in the Southeastern U.S. Atlantic shark gillnet fishery. The effects of the emergency rule on this fishery are anticipated to be small because during the period covered by the emergency rule, most of the fishing activity typically occurs south of 29°00' N lat., where the fishery will continue to operate under existing regulations, unaffected by this emergency rule.

The Southeast Atlantic gillnet fishery targets coastal migratory finfish species such as Spanish mackerel, whiting, and bluefish, but also lands species such as King mackerel, that are caught incidentally to fishing operations. NMFS believes that up to 56 vessels participate in the Southeast Atlantic gillnet fishery, annually. The primary species targeted is Spanish mackerel; however, these landings primarily occur south of 29°00' N lat., where the fishery will continue to operate under existing regulations, unaffected by this emergency rule. Fishers targeting whiting will be most affected by this rulemaking. During the ALWTRT's SE Subgroup meeting, fishers reported that in late February 2004, approximately 8 vessels began fishing for whiting using sink gillnet gear off Northeast Florida and that in 2004 and 2005, 15 vessels are estimated to have participated in this activity. In 2005, whiting catch in the affected area was 356,604 pounds (161,753 kg) with a dockside value of \$276,824.

This restriction has been announced on the NOAA weather channel, in newspapers, and other media. Gillnet fishermen may also call (727)824-5312 for updated information on gillnet restrictions along the Atlantic Coast of the Southeast U.S.

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#### Classification

Pursuant to section 4(b)(7) of the ESA, NMFS has determined that this action is necessary to prevent a significant risk to

the well-being of endangered right whales.

An Environmental Assessment for this action was prepared and is available from the agency upon request.

As prior notice and an opportunity for public comment are not required to be provided for this rule pursuant to 16 U.S.C. 1533(4)(b)(7), the analytical requirements of 5 U.S.C. 601 *et seq.*, are not applicable.

As required by 16 U.S.C. 1533(4)(b)(7)(B), NMFS has notified marine fisheries officials in Florida, Georgia, and South Carolina of this emergency rulemaking.

NMFS determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of Florida, Georgia, and South Carolina. This determination was submitted on October 20, 2006, for review by the responsible state agencies under section 307 of the CZMA. However, NMFS will follow the provisions at 15 CFR 930.32(b) authorizing a deviation from full consistency for emergencies, if the state concurrences are not received before the effective date of this rule.

This action has been determined to be not significant under Executive Order 12866.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

**Authority:** 16 U.S.C 1533(b)(7).

Dated: November 8, 2006.

**Samuel D. Rauch III,**

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

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