

consider the use of voluntary consensus standards.

### Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph 34(g), of the Instruction, from further environmental documentation. A final “Environmental Analysis Check List” and a final “Categorical Exclusion Determination” are available in the docket where indicated under **ADDRESSES**.

### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T01–111 to read as follows:

#### § 165.T01–111 Safety Zone: Metro North Railroad Bridge over the Norwalk River, Norwalk, Connecticut.

(a) *Location.* The following area is a safety zone: All waters of the Norwalk River, Norwalk, Connecticut, within 100 yards of the Metro North Railroad Bridge.

(b) *Effective date.* This section is effective from 3 p.m. EDT on August 6, 2004 until 11:59 p.m. EDT on October 15, 2004.

(c) *Regulations.* In accordance with the general regulations in § 165.33 of this part, entry into or movement within this zone is prohibited unless authorized by the Captain of the Port (COTP), Long Island Sound.

(d) *Authorizations:* Recreational vessels are authorized to pass under the bridge’s west span. All commercial vessels may pass under the bridge’s west span upon the request and

authorization by the Captain of the Port, Long Island Sound.

(e) *Compliance.* All persons and vessels shall comply with the instructions of the COTP, or the designated on-scene U.S. Coast Guard representative. Designated on-scene U.S. Coast Guard representatives include commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, state, and federal law enforcement vessels.

Dated: August 6, 2004.

**Peter J. Boynton,**

*Captain, U.S. Coast Guard, Captain of the Port, Long Island Sound.*

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## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

#### 46 CFR Part 388

[Docket No. MARAD–2003–15030]

RIN 2133–AB49

#### Administrative Waivers of the Coastwise Trade Laws for Eligible Vessels

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** The Maritime Administration (MARAD, or we, our or us) is publishing this final rule to implement the changes of the Maritime Transportation Security Act of 2002. This final rule implements regulations to waive the U.S.-build requirements of the Passenger Vessel Services Act and section 27 of the Merchant Marine Act, 1920, for eligible vessels to be documented with appropriate endorsement for employment in the coastwise trade as small passenger vessels or uninspected passenger vessels authorized to carry no more than 12 passengers for hire. This final rule also brings the application procedure into compliance with the Government Paperwork Elimination Act, which requires that by October 21, 2003, the government must provide “the option of electronic maintenance, submission, or disclosure of information when practicable as a substitute for paper.”

**DATES:** The effective date of this final rule is September 22, 2004.

**FOR FURTHER INFORMATION CONTACT:** Michael Hokana, Office of Ports and Domestic Shipping, Maritime Administration, MAR–830, Room 7201,

400 Seventh St., SW., Washington, DC 20590; telephone: (202) 366–0760.

**SUPPLEMENTARY INFORMATION:** Public Law 105–383, which authorized the Secretary of Transportation to grant waivers of certain requirements for the smallest of passenger vessels (those carrying 12 or fewer passengers) to operate in the coastwise trade, contained a sunset provision effective September 30, 2002. The Maritime Transportation Security Act of 2002, section 207(c), Public Law 107–295 (the Act), removed the sunset provision and added anti-fraud revocation authority.

Between January 2000 and September 2002, MARAD utilized regulations published at 46 CFR part 388 to accept applications from the public and to provide public notice of the intent to issue waivers to foreign built vessels for use in the coastwise passenger trade (See **Federal Register** notice at 65 FR 6905) (February 11, 2000). However, the regulation also contained the sunset included in the enabling legislation. The application process required a \$300 non-refundable fee, an “adverse affect” assessment on the U.S.-flag shipping and vessel building community, and a requirement that the vessel meet U.S. Coast Guard documentation standards. Waivers approved by MARAD, which set limits on vessel’s geographic use and required that all significant changes be conducted with MARAD’s prior approval, became a permanent part of the vessel’s coastwise endorsement. As required by the original enabling legislation and the implementing regulations, MARAD granted no waivers after September 30, 2002.

The Act signed by President Bush on November 25, 2002, repealed the September 30, 2002, sunset provision contained in section 505 of the Coast Guard Authorization Act of 1998 (Pub. L. 105–383). The Act also substitutes a new section 503, which requires the Secretary to revoke “a certificate or an endorsement issued under section 502, after notice and opportunity for a hearing, if the Secretary determines that the certificate or endorsement was obtained by fraud.” This section changes and supersedes the circumstances under which a waiver can be revoked. This final rule implements these two legislative changes.

This final rule also makes several administrative changes designed to simplify the application process. Under the simplified process, applicants are encouraged to apply online. The application is available on the MARAD Web site at <http://www.marad.dot.gov>

and includes the ability to charge the application fee to a major credit card.

MARAD initially published this rule in the **Federal Register** on April 30, 2003, as an interim final rule with request for comments. Comments on the interim final rule were due by May 30, 2003, and one set of comments was timely filed.

*Program Description:* Two agencies have responsibilities related to the coastwise trade laws: the Coast Guard, which issues the vessel documents and endorsements that authorize vessels to engage in the coastwise trade; and the Maritime Administration, by delegation from the Secretary of Transportation, which has the authority to process applications for waivers of the coastwise laws and to grant such waivers if they do not adversely affect United States vessel builders or United States-built vessel coastwise trade businesses. In this rulemaking, MARAD is providing the procedures to be followed in processing applications for waivers, or revoking waivers previously granted. Upon grant of a waiver, MARAD will notify the applicant and the Coast Guard. Thereafter, you may register the vessel so waived with the Coast Guard under the Coast Guard's normal procedures, provided the vessel is otherwise eligible.

Vessels eligible for a waiver of the coastwise trade laws will be limited to foreign-built or foreign rebuilt small passenger vessels and uninspected passenger vessels as defined by section 2101 of title 46, United States Code. Vessels of unknown origin are considered to be foreign built. Additionally, vessels requested for consideration must be at least three (3) years old. MARAD will not grant waivers in instances where such waiver activity will have an unduly harmful impact on U.S. shipyards or U.S.-flag ship operators. In order to meet the public comment provisions of title V of Public Law 105-383, MARAD will give notice of applications in the **Federal Register** and will provide the appropriate references to the DOT Dockets where applications are filed for public reference and where comments may be submitted. After a period of time to analyze comments and to assess the impact that a proposed waiver will have on the U.S.-flag shipping and shipbuilding industries, MARAD will issue a determination.

MARAD does not have the authority to waive citizenship requirements for vessel ownership and documentation. The Coast Guard will ascertain whether the shipowner is qualified as a citizen to register a vessel. In addition, the Coast Guard, not MARAD, will

determine whether a particular vessel will be considered a small passenger vessel or an uninspected passenger vessel. However, we may refuse to process an application if the vessel is not the type eligible for a waiver. Prospective applicants for a coastwise trade law waiver may wish to consult with the Coast Guard in order to make a determination regarding the vessel's status prior to initiating the waiver application process with MARAD.

Under title V, section 503 previously contained authority to revoke coastwise endorsements under the limited circumstances where a foreign-built or foreign-rebuilt passenger vessel, that had been allowed into service, substantially changed that service. The Act amended section 503 to provide fraud in the application process as the basis to revoke an endorsement. MARAD's procedure for revocation of a waiver will not change significantly. Procedures will still include the publication of a notice in the **Federal Register** seeking public comments on the proposed revocation. A hearing will be provided, on MARAD's motion or at the applicant's request, prior to making a determination. If MARAD determines that the endorsement was obtained by fraud, MARAD will issue a formal letter of waiver revocation with an appropriate grace period. This determination will be sent to the Coast Guard for revocation of the vessel's coastwise endorsement.

MARAD's decisions to grant or deny a waiver and to revoke or not revoke a waiver are appealable to the Maritime Administrator and are final only on expiration of the time period for these petitions, or, where the Administrator grants review, upon the Administrator's final decision.

#### Comments on the Interim Final Rule

One letter commenting on the interim final rule was received. The comments were submitted by counsel for The Boat Company, an owner of U.S.-built vessels and a Southeastern Alaskan charter operator. Review and consideration of the opinions and recommended changes set forth in the comments follows.

The first comment criticizes MARAD's application of sections 388.4(b) and (c) of title 46, Code of Federal Regulations, in prior waiver application determinations. The Boat Company argues that MARAD should not grant applications in cases where applicants describe their intended area of operation too broadly (e.g., where waiver is sought for "all navigable waterways of" or "all coastal waters of the United States"). The Boat Company believes that applicants cannot attest

that grant of a requested waiver will not adversely affect U.S.-hull vessel owners or boat builders if the area described in the waiver is too broad. Further, The Boat Company argues, abstractly, that broad waivers defeat the intent of the Act and reasonable public notice requirements.

Despite The Boat Company's criticism as to how MARAD applies sections 388.4(b) and (c), it did not provide, suggest, or request that any changes be made to either section. Since MARAD believes that sections 388.4(b) and (c) provide sufficiently clear standards regarding geographic regions (i.e., "the same geographic region" in 388.4(b); "the same geographic area" in 388.4(c)(1); and "the same market" in 388.4(c)(2)), MARAD declines to change these sections on its own motion. As changes to MARAD's rules were neither proposed nor requested, no further action on the part of MARAD is required with regard to this input in the context of this rulemaking.

MARAD notes that criticisms such as those above underscore the reason why MARAD publishes all waiver applications in the **Federal Register** and solicits public comment thereon. This notice and comment mechanism provides an avenue whereby concerned parties may raise objections to applications, including such things as the breadth of waivers and other fact-specific issues. MARAD encourages parties with concerns regarding specific applications to file comments so that MARAD may address such issues on a case by case basis.

Finally, MARAD fails to see how a broad waiver application negates or diminishes the adequacy of public notice provided in the **Federal Register**. Simply stated, companies that are concerned that a specific waiver application may have an undue adverse effect on them are encouraged to file comments on the waiver request. If such companies are uncertain as to whether or not a specific waiver application encompasses regions in which they conduct business, MARAD encourages them to file comments so that MARAD may consider and address, where appropriate, any ambiguities or uncertainties.

The second comment by The Boat Company concerns the word "unduly" in section 388.4(a). Counsel for The Boat Company suggests that MARAD's inclusion of the word "unduly" in our regulations was "tantamount to an agency rewriting legislation." The Boat Company argues that there is no evidence of congressional intent or authority to include such language, and that it creates a standard not called for

in the legislation. MARAD disagrees for several reasons.

Public Law 105–383, title V, sections 501 and 502 specifically delegated authority to the Secretary of Transportation to review and approve waiver applications, (which was in turn delegated to MARAD). Sections 501 and 502 provide that MARAD, in its discretion, may approve waiver applications if it “determine(s) that the employment of the vessel in the coastwise trade will not adversely affect” United States vessel builders or United States-built vessel coastwise trade businesses. The statute did not provide any specific standards MARAD should apply in making such determinations, nor did it define “adverse affect.” Instead, Congress deferred to MARAD’s “appropriate expertise” and discretion in exercising its delegated authority to review and approve waiver applications.

To carry out its delegated duties, MARAD drafted implementing regulations to provide standards used to evaluate waiver applications. As part of its evaluation standards, MARAD included “unduly” in its regulations in response to section 501(3) of Public Law 105–383. In section 501(3), Congress made its intent clear that most waiver applications should be granted, by providing “each Congress *routinely* approves numerous such requests for waiver and *rarely* rejects any such request” (emphasis added). To advance this congressional intent, and thereby insure that applications are infrequently denied, MARAD included the word “unduly” in section 388.4 to prevent meritless challenges to applications based on frivolous, trivial, or insubstantial showings of “adverse affect.”

MARAD believes that its interpretation of “adverse affect,” read in light of the statute as a whole, is a reasonable and permissible interpretation under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984) (“*Chevron*”). Applying *Chevron*, agencies are confronted with two questions regarding their interpretation of congressional language. The first question is “whether Congress has directly spoken to the precise question at issue (*Id.* at 842) (“*Chevron* step one”). To find no ambiguity, Congress must have clearly manifested its intention with respect to a particular issue (See *Young v. Community Nutrition Institute*, 476 U.S. 974, 980 (1986)). If Congress has spoken directly and plainly, the agency must implement Congress’ unambiguously expressed intent (*Chevron*, 467 U.S. at 842–843). If, however, legislation is silent or

ambiguous as to the meaning of a term, an agency may elucidate the term in a reasonable fashion (“*Chevron* step two”); (*Chevron*, 467 U.S. at 842–843; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Since the term “adverse affect” was not defined by Congress, and is ambiguous as to what kind (*e.g.*, tangible or intangible, monetary or non-monetary) or what degree of “adverse affect” would warrant denial of a waiver application, MARAD may elucidate the term, under *Chevron*, in a reasonable and permissible fashion. It did so by adding “unduly” to modify “adverse affect.”

Without the addition of “unduly,” “adverse affect,” if strictly interpreted, could produce absurd results. For instance, MARAD could not grant a waiver application if granting it would reduce a competing company’s revenue by one dollar per year. Such a strict reading of “adverse affect” would clearly frustrate Congress’ intent, as it could potentially lead to the denial of most or all waiver applications by a showing of minimal adversity, or, in our example, the loss of one dollar per annum. Thus, MARAD, in its discretion, adopted a reasonable standard in interpreting “adverse affect” in order to carry out its delegated duties and to effectuate the intent of Congress. MARAD’s now extensive experience with the implementation of the Small Vessel Waiver Program has found this standard to be both reasonable and practicable. Accordingly, MARAD declines to delete the term “unduly” from this final rule.

The third and final comment asks MARAD to summarily eliminate the Southeast Alaska region as an area eligible for waivers. The Boat Company argues that since we have denied waivers in this region in the past, as we did in the *Caledonia* decision, (Docket No. MARAD 2001–8932–16) we should codify this result and deny even the possibility of future waivers to applicants in this region. MARAD declines to implement this suggestion, finding instead that a case basis approach is required, should regional market conditions or other variables change in the future that may warrant a reassessment of the Southeast Alaska region as an area eligible for waivers.

#### Rulemaking Analyses and Notices

##### *Executive Order 12866 and DOT Regulatory Policies and Procedures*

This final rule is not significant under section 3(f) of Executive Order 12866, and as a consequence, OMB did not review the rule. This final rule is also

not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979). It is also not considered a major rule for purposes of congressional review under Public Law 104–121. The costs and overall economic impact of this rulemaking are so minimal that no further analysis is necessary. Vessels eligible for a waiver of the coastwise trade laws will be limited to foreign built or foreign rebuilt small passenger vessels and uninspected passenger vessels as defined by section 2101 of title 46, United States Code. Additionally, vessels requested for consideration must be greater than three years old. We will not grant waivers in instances where such waiver activity will have an unduly adverse effect on U.S. vessel builders or U.S. businesses that use U.S. flag vessels. Under title V, MARAD also has the authority to revoke coastwise endorsements under the limited circumstances where a foreign-built or foreign-rebuilt passenger vessel, previously allowed into service, is deemed to have obtained such endorsement through fraud.

##### *Executive Order 13132*

We analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 13132 (“*Federalism*”) and have determined that it does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. The regulations herein have no substantial effects on the States, the current Federal-State relationship, or the current distribution of power and responsibilities among local officials. Therefore, MARAD did not consult with State and local officials because it was not necessary.

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires MARAD to assess the impact that regulations will have on small entities. After analysis of this final rule, MARAD certifies that this final rule will not have a significant economic impact on a substantial number of small businesses. Although we expect many applicants for vessel waivers to be small businesses, we do not believe that the economic impact will be significant. This regulation allows MARAD to waive the U.S.-build and other requirements for eligible vessels and adds a small economic benefit to applicants. This regulation will only allow vessels to carry the statutory maximum of 12 passengers. As a consequence, MARAD estimates that a vessel owner who

receives a waiver may earn a few hundred dollars per year for localized operations (geographic restrictions apply) such as whale watching and personalized fishing expeditions. Also, the economic impact of this rule is limited because it precludes vessel owners from participating in other economic activities such as carrying cargo and commercial fishing.

#### *Environmental Assessment*

This rule would not significantly affect the environment because the small number and small size of vessels admitted to U.S. registry under this waiver program will have little or no effect on the environment. Accordingly, an Environmental Impact Statement is not required under the National Environmental Policy Act of 1969.

#### *Paperwork Reduction Act*

This final rule reactivates a requirement for the collection of information that was used before the sunset provision contained in the Coast Guard Authorization Act of 1998 ended the authority to grant waivers. The Office of Management and Budget (OMB) has reviewed and approved the information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). The OMB approval number is 2133-0529.

#### *Unfunded Mandates Reform Act*

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves this objective of U.S. policy.

#### *Executive Order 13175*

MARAD believes that regulations evolving from this final rule will have no significant or unique effect on the communities of Indian tribal governments when analyzed under the principles and criteria contained in Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments). Therefore, the funding and consultation requirements of this Executive Order do not apply.

#### *Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-

reference this action with the Unified Agenda.

#### **List of Subjects in 46 CFR Part 388**

Administrative practice and procedure, Maritime carriers, Passenger vessels, Reporting and recordkeeping requirements.

■ Accordingly, the Maritime Administration amends 46 CFR chapter II, subchapter J, by revising part 388 to read as follows:

#### **PART 388—ADMINISTRATIVE WAIVERS OF THE COASTWISE TRADE LAWS**

Sec.	
388.1	Purpose.
388.2	Definitions.
388.3	Application and fee.
388.4	Criteria for grant of a waiver.
388.5	Criteria for revocation of a waiver.
388.6	Process.

**Authority:** 46 App. U.S.C. 1114(b); Pub. L. 105-383, 112 Stat. 3445 (46 U.S.C. 12106 note); 49 CFR 1.66.

##### **§ 388.1 Purpose.**

This part prescribes regulations implementing the provisions of Title V of Public Law 105-383 (112 Stat. 3445), which grants the Secretary authority to review and approve applications for waiver of the coastwise trade laws to allow the carriage of no more than twelve passengers for hire on vessels, which are three years old or more, built or rebuilt outside the United States, and grants authority for revocation of those waivers.

##### **§ 388.2 Definitions.**

For the purposes of this part:  
(a) *Administrator* means the Maritime Administrator.

(b) *Coastwise Trade Laws* include:  
(1) The Coastwise Endorsement Provision of the Vessel Documentation Laws, (46 U.S.C. 12106);  
(2) The Passenger Services Act, section 8 of the Act of June 19, 1886 (46 App. U.S.C. 289); and  
(3) The Jones Act, section 27 of the Merchant Marine Act, 1920 (46 App. U.S.C. 883).

(c) *Eligible Vessel* means a vessel of five or more tons that is either a small passenger vessel or an uninspected passenger vessel that—

(1) Was not built in the United States and is at least 3 years of age; or  
(2) If rebuilt, was rebuilt outside the United States at least 3 years before the certificate of documentation with appropriate endorsement if granted, would become effective.

(d) *MARAD* means the Maritime Administration, U.S. Department of Transportation.

(e) *Secretary* means the Secretary of Transportation.

(f) The terms *small passenger vessel*, *uninspected passenger vessel* and *passenger for hire* have the meaning given such terms by 46 U.S.C. 2101.

(g) *Fraud* means the intentional misrepresentation of a material fact or facts.

##### **§ 388.3 Application and fee.**

(a) An owner of a vessel may choose either of two methods to apply for an administrative waiver of the coastwise trade laws of the United States for an eligible vessel to carry no more than twelve passengers for hire.

(1) The application form contained on MARAD's Web site at <http://www.marad.dot.gov> may be submitted electronically with credit card or Automated Clearinghouse (ACH) payment of the \$300 application fee.

(2) Alternatively, applicants may send written applications to Small Vessel Waiver Applications, Office of Ports and Domestic Shipping, MAR-830, Room 7201, 400 7th St., SW., Washington, DC 20590. Written applications need not be in any particular format, but must be signed, be accompanied by a check for \$300 made out to the order of "Maritime Administration", and contain the following information:

(i) Name of vessel and owner for which waiver is requested and the vessel's official number.

(ii) Size, capacity and tonnage of vessel (state whether tonnage is measured pursuant to 46 U.S.C. 14502, or otherwise, and if otherwise, how measured).

(iii) Intended use for vessel, including geographic region of intended operation and trade.

(iv) Date and place of construction and (if applicable) rebuilding. (If applicant is unable to document the origin of the vessel, foreign construction will be assumed).

(v) Name, address, and telephone number of the vessel owner.

(vi) A statement on the impact this waiver will have on other commercial passenger vessel operators, including a statement describing the operations of existing operators.

(vii) A statement on the impact this waiver will have on U.S. shipyards.

(viii) A statement that the applicant represents that the foregoing information is true to the best of the applicant's knowledge.

(b) MARAD may ask additional questions of the applicant as part of the application review.

##### **§ 388.4 Criteria for grant of a waiver.**

(a) General Criteria. (1) A waiver of the foreign build and/or foreign rebuild prohibition in the coastwise trade laws

will be granted for an eligible vessel only if we determine that the employment of the vessel in the coastwise trade will not unduly adversely affect—

(i) United States vessel builders; or  
(ii) The coastwise trade business of any person who employs vessels built in the United States in that business.

(2) The determination of “unduly adverse affect” on a coastwise operator or a U.S. vessel builder may not be limited to operators or builders of vessels carrying 12 or fewer passengers.

(3) We may evaluate the expected impact of the proposed waiver on the basis of the information received from all sources, including public comment, internal investigation and analysis, and any other sources of information deemed appropriate.

(b) Impact on U.S. vessel builders. We may use the following criteria to determine the effect on U.S. vessel builders: Whether a potentially affected U.S. vessel builder has a history of construction of similar vessels, or can demonstrate the capability and capacity and the fact it has taken definite steps to offer to build a similar vessel, for use in the same geographic region of the United States, as the proposed vessel of the applicant.

(c) Impact on coastwise trade business. We may use the following criteria to determine the effect on existing operators of U.S.-built vessels in coastwise trade:

(1) Whether the proposed vessel of the applicant and a vessel of an existing operator (or the vessel of an operator that can demonstrate it has taken definite steps to begin operation) would provide similar commercial service and would operate in the same geographic area.

(2) The number of similar vessels operating or proposed to operate in the same market with the same or similar itinerary, relative to the size of the market. For example, a single vessel may have a small impact on a large market.

(d) Advance notice and approval needed for changes. When we approve a waiver application, we will notify the applicant that no substantial change in the employment of the vessel in the coastwise trade may be made without prior notice to MARAD. In general, a substantial change in operating area will require a new waiver application.

#### **§ 388.5 Criteria for revocation of a waiver.**

We shall revoke a waiver previously granted under this part if we determine, after notice and opportunity for a hearing, that fraud was involved in any part of the waiver application.

#### **§ 388.6 Process.**

(a) Initial process. (1) We will review each application for completeness as received. We will notify the applicant if additional information is necessary or if the application does not meet the initial eligibility requirements for waiver. All applications will be available for public inspection electronically in the Department of Transportation Docket at <http://dot.dms.gov>.

(2) Applications being processed on the merits will be noticed in the **Federal Register**. Interested parties will be given an opportunity to comment on whether introduction of any proposed vessel would adversely affect them. In the absence of duly filed objections to an application, and in the absence of unduly adverse impact on vessel builders or businesses employing U.S.-built vessels otherwise discovered by us, we will conclude that there will be no adverse effect. If an objection to an application is received, additional information may be sought from the objector. The applicant will be given a sufficient amount of time to respond. The Director, Office of Ports and Domestic Shipping, will then either make a decision based on the written submissions and all available information or, on MARAD’s motion or at the applicant’s request, hold a hearing on the application and make a decision based on the hearing record. The decision will be communicated to the applicant, commenters and the United States Coast Guard in writing and placed in the docket. If MARAD grants a waiver, the applicant must thereafter contact the Coast Guard to obtain the necessary documentation for domestic operation. MARAD’s waiver does not satisfy other requirements of the Coast Guard for documentation. The waiver, if approved, will be assigned to the vessel.

(b) Revocation. We may, upon the request of a U.S. builder or a coastwise trade business of a person who employs U.S.-built vessels or upon our own initiative propose to revoke a waiver granted under this part, on the basis that the waiver was obtained through fraud. The grantee of the waiver in question will be notified directly by mail, and a notice will be published in the **Federal Register**. The original docket of the application will be reopened. We may request additional information from the applicant granted the waiver or from any respondent to the notice. The Director, Office of Ports and Domestic Shipping, will then either make a decision based on the written submissions and all available information or, on MARAD’s motion or at the applicant’s request, hold a hearing

on the proposed revocation and make a decision based on the hearing record. The decision will be communicated in writing to: the applicant granted the waiver, the requestor (if any), each respondent to the proposed revocation notice, the Coast Guard; and placed in the docket. If MARAD revokes a waiver, the Coast Guard, automatically and without further proceedings, shall revoke the vessel’s coastwise endorsement.

(c) Review of determinations. (1) The decisions by the Director, Office of Ports and Domestic Shipping, to grant a waiver, deny a waiver, or revoke a waiver will not be final until time for discretionary review by the Administrator has expired. Each decision to grant, deny, or revoke a waiver will be made in writing and a copy of the written decision will be provided to each applicant and other parties to the decision. Applicants, persons who requested revocation of a waiver, and persons who submitted comments in response to a **Federal Register** notice may petition the Administrator to review a decision by the Director, Office of Ports and Domestic Shipping, to grant a waiver, deny a waiver, or revoke a waiver within five (5) business days after such decision is filed in the docket. Each petition for review should state the petitioner’s standing and the reasons review is being sought, clearly pointing out alleged errors of fact or misapplied points of law. Within five (5) business days of submission of a petition for review, the applicant, and other persons with standing, may request that the Administrator not review a decision by the Director, Office of Ports and Domestic Shipping, to grant, deny, or revoke a waiver. Such petitions and responses must either be sent by facsimile to the Secretary, Maritime Administration, at (202) 366–9206 or filed electronically in the appropriate DOT docket at <http://dms.dot.gov>. The Administrator will decide whether to review within five (5) business days following the last day for submission of a request that the Administrator not take review. If the Administrator undertakes review, the decision by the Director, Office of Ports and Domestic Shipping, is stayed until final disposition. In the event the Administrator decides to undertake review, a decision will be made based on the written submissions and all available information. As a matter of discretion, the Administrator or designated representative may hold a hearing on the proposed action and make a decision based on the hearing record. The decision will be

communicated in writing to the interested parties and the Coast Guard. In the review process, the decision of the Maritime Administrator is the final disposition. In the absence of any petition for review, the determination by the Director, Office of Ports and Domestic Shipping, becomes final on the sixth business day after the decision. The Secretary, MARAD, may extend any of the time limits, but only for good cause shown.

(2) Such petitions and responses must either be sent by facsimile to the Secretary, Maritime Administration, at (202) 366-9206 or filed electronically in the appropriate DOT docket at <http://dms.dot.gov>. The Administrator will decide whether to review within five (5) business days following the last day for submission of a request that the Administrator not take review. If the Administrator takes review, the decision by the Director, Office of Ports and Domestic Shipping, is stayed until final disposition. In the event the Administrator decides to take review, a decision will be made based on the written submissions and all available information. As a matter of discretion, the Administrator or designated representative may hold a hearing on the proposed action and make a decision based on the hearing record. The decision will be communicated in writing to the interested parties and the Coast Guard. In the review process, the decision of the Maritime Administrator is the final disposition. In the absence of any petition for review, the determination by the Director, Office of Ports and Domestic Shipping, becomes final on the sixth business day after the decision. The Secretary, MARAD, may extend any of the time limits, but only for good cause shown.

By Order of the Maritime Administrator.

Dated: August 11, 2004.

**Joel C. Richard,**

*Secretary, Maritime Administration.*

[FR Doc. 04-18861 Filed 8-20-04; 8:45 am]

**BILLING CODE 4910-81-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 030221039-4240-12; I.D. 081704A]

#### Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP)

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

**ACTION:** Temporary rule.

**SUMMARY:** The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the ALWTRP's implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,942 square nautical miles (nm<sup>2</sup>) (6,660 km<sup>2</sup>), southeast of Cape Cod, MA, for 15 days. The purpose of this action is to provide protection to an aggregation of North Atlantic right whales (right whales).

**DATES:** Effective beginning at 0001 hours August 25, 2004, through 2400 hours September 8, 2004.

**ADDRESSES:** Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Diane Borggaard, NMFS/Northeast Region, 978-281-9328 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301-713-1401.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at <http://www.nero.noaa.gov/whaletrp/>.

##### Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and

humpback) as well as to provide conservation benefits to a fourth non-endangered species (minke) due to incidental interaction with commercial fishing activities. The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15-day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15-day period and asking fishermen not to set any additional gear in the DAM zone during the 15-day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm<sup>2</sup> (139 km<sup>2</sup>)) such that right whale density is equal to or greater than 0.04 right whales per nm<sup>2</sup> (1.85 km<sup>2</sup>). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On August 10, 2004, NMFS received a report of six right whales in the proximity of 41°15' N. lat. and 69°18' W. long. This position lies southeast of Cape Cod, MA. After conducting an investigation, the Northeast Fisheries