Dated: April 8, 1993.

Richard N. Smith,

Acting Director, U.S. Fish and Wildlife Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 930363-3063]

RIN 0648-AF06

Designated Critical Habitat; Northern Right Whale

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed rule.

SUMMARY: NMFS proposes to designate critical habitat for the northern right whale (*Eubalaena glacialis*) pursuant to the Endangered Species Act of 1973 (ESA). The habitat proposed for designation are portions of Cape Cod Bay, Stellwagen Bank and waters adjacent to the coasts of Georgia and Florida. In addition, the proposed designation is based on the consideration of those physical and biological features of the habitat that are essential to the conservation of the species and that may require special management consideration or protection. The direct economic and other impacts resulting from this critical habitat designation are expected to be minimal. The designation of critical habitat provides explicit notice to Federal agencies and the public that these areas and features are vital to the conservation of the species.

DATES: Comments must be received on or before July 19, 1993. Requests for a public hearing must be received on or before July 6, 1993.

ADDRESSES: Comments and requests for a public hearing should be addressed to the Director, Office of Protected Resources, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Robert C. Ziobro, Protected Species Management Division, 301/713-2322.

SUPPLEMENTARY INFORMATION:

Background

The northern right whale is listed as endangered under the ESA. The objective of the ESA is to provide protection for ecosystems upon which endangered species depend and provide a program for the conservation and recovery of such species.

The Right Whale Recovery Team petitioned NMFS to designate critical habitat for the northern right whale on May 18, 1990. A **Federal Register** notice was published on July 12, 1990 (55 FR 28670), requesting information and inviting comments on the petition. Although most agencies, organizations, and private groups responded favorably to the designation of critical habitat for each area, there was some concern about the possibilities of restrictions to existing operations in the areas. Concerns were raised about fishing restrictions or potential restrictions in the petitioned areas for oil and gas activities, and international traffic patterns changes.

Some of the comments received favored expansion of critical habitat to include the migratory route of the whales. Other comments focusss on the need for establishing a monitoring plan or making funds available to gather additional data on such areas as humans effects on whale food supply, and acoustic effects on whales from dredging operations or related activities. Information received by NMFS has been considered and incorporated as appropriate.

NMFS has completed an environmental assessment of the proposed action and two alternatives for the designation of critical habitat off the eastern coast of the United States. The assessment concluded in a finding of no significant impact for the proposed action.

Definition of Critical Habitat

Critical habitat is defined in section 3(5)(A) of the ESA as

> (i) the specific areas within the geographical area occupied by the species * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

Areas outside the current range of a species can only be designated if a designation limited to the species' present distribution would be inadequate to ensure the conservation of the species. The term "conservation", as defined in section 3 (3) of the ESA, means "* * * to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."

The criteria to be considered in designating critical habitat are specified under 50 CFR 424.12. NMFS must consider the requirements of the species, including:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing of offspring; and, generally,

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of the species.

In addition, NMFS must focus on and list the known physical and biological features (primary constituent elements) within the designated area(s) that are essential to the conservation of the species and that may require special management considerations or protection. These essential features may include, but are not limited to, calving areas, food resources, water quality or quantity, and vegetation and soil types.

Consideration of Economic and Other Factors

The economic, environmental and other impacts of a designation must also be evaluated and considered. NMFS must identify present and anticipated activities that may adversely modify the proposed critical habitat or be affected by a designation. An area may be excluded from a critical habitat designation if NMFS determines that the overall benefits of exclusion outweigh the benefits of designation, unless the exclusion will result in the extinction of the species.

The impacts considered in this analysis are only those incremental impacts specifically resulting from a critical habitat designation, above the economic and other impacts attributable to listing the species or resulting from other authorities. Since listing a species under the ESA provides significant protection to the species' habitat, in many cases the direct economic and other impacts resulting from the critical habitat designation, over and above the impacts of the listing itself, are minimal (see Significance of Designating Critical Habitat section of this preamble). In general, the designation of critical habitat only duplicates and reinforces the substantive protection resulting from the listing itself.

Impacts attributable to listing include those resulting from the taking

prohibitions under section 9 and associated regulations. "Taking" as defined in the ESA includes harm to a listed species. Harm can occur through destruction or modification of habitat (whether or not designated as critical) that significantly impairs essential behaviors, including breeding, feeding or sheltering.

Impacts attributable to listing also include those resulting from the responsibility of all Federal agencies under section 7 to ensure that their actions are not likely to jeopardize endangered or threatened species. An action could be likely to jeopardize the continued existence of a listed species through the destruction or modification of its habitat, regardless of whether or not that habitat has been designated as critical.

Significance of Designating Critical Habitat

The designation of critical habitat does not, in itself, restrict human activities within the area or mandate any specific management or recovery action. A critical habitat designation contributes to species conservation primarily by identifying critically imported areas and by describing the features within the areas that are essential to the species, thus alerting public and private entities to the importance of the area. Under the ESA, the only direct impact of a critical habitat designation is through the provisions of section 7. Section 7 applies only to actions with Federal involvement (e.g., authorized, funded, conducted), and does not affect exclusively state or private activities.

Under the section 7 provisions, a designation of critical habitat would require Federal agencies to ensure that any action they authorize, fund or carry out is not likely to destroy or adversely modify the designated critical habitat. Activities that adversely modify critical habitat are defined as those actions that "appreciably diminish the value of critical habitat for both the survival and recovery" of the species (50 CFR 402.02). However, if no critical habitat has been designated, Federal agencies still must ensure that their actions are not likely to jeopardize the continued existence of the listed species. Activities that jeopardize a species are defined as those actions that "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery" of the species (50 CFR 402.02). Using these definitions, activities that destroy or adversely modify critical habitat also are likely to jeopardize the species. Therefore, the protection provided by a critical habitat designation usually only duplicates the protection provided under the section 7 jeopardy provision. Nevertheless, designation of critical habitat may provide additional benefits to a species in cases where areas outside of the species' current range have been designated. In these cases, it is expected that Federal agencies would consult on additional actions occurring in these areas.

A designation of critical habitat provides a clearer indication to Federal agencies as to when consultation under section 7 is required, particularly in cases where the action would not result in direct mortality or injury to individuals of a listed species (e.g., an action occurring within the critical area when a migratory species is not present). The critical habitat designation, describing the essential features of the habitat, also assists in determining which activities conducted outside the designated area are subject to section 7 (i.e., activities that may affect essential features of the designated area). For example, disposal of waste material in water adjacent to a critical habitat area may affect an essential feature of the designated habitat (water quality) and would be subject to the provisions of section 7 of the ESA.

A critical habitat designation would also assist Federal agencies in planning future actions, since the designation establishes, in advance, those habitats that will be given special consideration in section 7 consultations. This is particularly true in cases where there are alternative areas that would provide for the conservation of the species. With a designation of critical habitat, potential conflicts between projects and endangered or threatened species can be identified and possibly avoided early in the agency's planning process.

Another indirect benefit of designating critical habitat is that it helps focus Federal, state and private conservation and management efforts in those areas. Recovery efforts may address special considerations needed in critical habitat areas, including conservation regulations to restrict private as well as Federal activities. The economic and other impacts of these actions would be considered at the time of proposal, and, therefore, are not considered in the critical habitat designation process. Other Federal, state and local laws or regulations, such as zoning or wetlands protection, may also provide special protection for critical habitat areas.

Process for Designating Critical Habitat

Developing a proposal for critical habitat designation involves three main considerations. First, the biological needs of the species are evaluated and essential habitat areas and features identified. If there are alternative areas that would provide for the conservation of the species, these alternatives are also identified. Second, the need for special management considerations or protection of the area(s) or features is evaluated. Finally, the probable economic and other impacts of designating these essential areas as "critical habitat" are evaluated. After considering the requirements of the species, the need for special management, and the impacts of the designation, the proposed critical habitat is published in the **Federal Register** for comment. The final critical habitat designation, considering comments on the proposal and impacts assessment, is published within 1 year of the proposal. Final critical habitat designations may be revised, using the same process, as new data become available.

A description of the essential habitat, need for special management, and impacts of designating as critical habitat, as well as the proposed action, are described in the following sections for the northern right whale.

Essential Habitat of the Northern Right Whale

The overall spatial requirements for right whales are not known. Northern right whales are observed from Florida to Nova Scotia within the span of a year, and may require different habitats throughout the seasons of the year. The movement of the whales between different areas may be driven by such factors as prey availability, reproductive needs, and metabolic constraints, or any other variable(s). The distribution pattern observed for northern right whales indicates that they occupy at least five principle habitats, in the North Atlantic: Southeastern U.S. coast, the Great South Channel, Cape Cod Bay, the Bay of Fundy, and the Scotian Shelf. These high use areas may comprise the minimal space required for normal behavior that will support a viable northern right whale population.

The known primary prey of the northern right whale is the copepod, *Calanus finmarchicus* (Kraus and Kenney 1991) although other similar sized zooplankton or other prey organisms may be utilized. In order to receive sufficient sustenance and maintain their energy requirements, northern right whales must feed on

dense patches of these copepods or other organisms. Such dense patches of zooplankton are not known to be common in the open ocean, but have been observed seasonally in the Great South Channel and Cape Cod Bay. It is speculated that the topographic and seasonal oceanographic characteristics of these two areas are conducive to the dense growth of zooplankton. Based on observed distribution patterns, sufficient quantities of prey are likely to be available for the northern right whale in the waters of the Bay of Fundy and the Scotian Shelf. Feeding has been observed in all four areas at what appears to be depths ranging from the surface to the bottom. Because feeding has not been observed along the southeastern U.S. coast, it is believed that these whales using this area may fast or feed rarely during the winter.

Although little information is available on right whale physiology, it is hypothesized that the metabolic rate of the whale is affected by water temperature (Kraus and Kenney 1991). Northern right whales observed along the southeastern coast occur in a band of relatively cool water (10–13 °C). By giving birth in this water, the temperature may be both low enough to cool the cow, yet warm enough not to cause problems for a newborn calf. Once a calf has achieved a larger body mass and associated blubber layer through nursing, it is better able to accommodate the same cold waters as an adult.

The observed preferences of cow/calf pairs to the Bay of Fundy, Cape Cod Bay, and the southeastern U.S. coastal areas may be due to the geology and topography that affords protection from large waves and rough water. The land masses associated with the Bay of Fundy and Cape Cod Bay interrupt strong winds and offshore wave activity is minimized on the southeast coast by a relatively shallow, very long underwater shelf (extending almost 65 miles (105 km) offshore).

Courtship activities have been observed throughout most of the range of the northern right whale, except the southeast coast (Kraus 1985). Courtship activities appear to occur principally in groups at the surface, during which northern right whales are relatively oblivious to other activities on the surface, such as boat traffic (Kraus 1985). Thus, the apparent habitat requirement for mating would be open, unobstructed surface waters, but this activity does not appear to be limited by location or time of year.

Special Management Considerations or Protection

Human activities in northern right whale habitat areas may have impacts on the habitat. These activities include: Vessel activity, fishing, pollution, mining, and oil and gas exploration. The effect of any of these activities either directly to individual whales or on the habitat could have consequences that may restrict the recovery of the northern right whale population. Therefore, special management considerations may be required in order to protect and promote the recovery of the northern right whale. Because the northern right whale is a migratory species, management of certain activities in a habitat area might only be required seasonally.

Discharges from municipal, industrial, and non-point sources, vessel activity, dredging activities, dredge spoil disposal and other sources may degrade essential habitat, which could have deleterious effects on the northern right whale population. Plankton is at the base of most marine food chains, and as such is often indicative of the health of the marine ecosystem. Pollutants may affect phytoplankton and zooplankton populations in a way that decreases the density and abundance of specific zooplankton patches on which northern right whales feed. In addition, pollution may affect the feeding patterns and habitat use of other components of the marine ecosystem which in turn could impact food and habitat availability for the northern right whale. Pollutants may also have direct toxic effects on the whale. Monitoring of known and potential pollution sources in nearshore critical habitats may be necessary to insure that these sources are not decreasing the northern right whale's ability to gain maximum benefit from use of the area.

Varying degrees of vessel activity occur in all known essential habitats. These activities include recreational and commercial fishing vessels, commercial transport vessels, passenger vessels, recreational boats, whalewatching boats, research vessels, and military vessels (e.g., surface ships, submarines, helicopters, and low-altitude aircraft). Vessel activities can change whale behavior, disrupt feeding practices, disturb courtship rituals, break up food sources, and harm or even kill whales through collisions. On January 5, 1993, a U.S. Coast Guard cutter struck and killed a Northern right whale calf approximately 10 miles (16 km) north of St. Augustine, Florida. When northern right whales are engaged in courtship or surface feeding activities, they appear to be oblivious to vessels and may be at higher risk of collisions at these times (NMFS 1991). Calves and single northern right whales, on the other hand, have been observed to exhibit avoidance behavior in response to the sound of vessels (NMFS 1991). Turbulence associated with vessel traffic may also indirectly affect northern right whales by breaking up the dense surface zooplankton patches in certain whale feeding areas. Special vessel traffic management considerations may be necessary in certain areas when northern right whales are present.

Although vessel traffic may impact individual northern right whales and their habitat, they have not been observed to abandon an area due to vessel activity. Historical records indicate that northern right whales annually returned to the same area, despite intense harassment such as whaling activities. Whalewatching and research vessels presently follow distance and time restrictions with respect to their proximity to northern right whales. Shipping lanes may require temporary relocation or certain restrictions while northern right whales are present in critical habitat areas.

Nevertheless, northern right whales are no longer observed in certain areas where they once were common, such as Delaware Bay, New York Bight, and Long Island Sound (NMFS 1991). The absence of whale sightings in these areas may be due to one or a combination of several factors, such as: Exclusion by human activities, habitat degradation, insufficient quantities of prey due to habitat or natural alterations in the physical environment, extinction of an independent breeding group that used these areas, contraction of the species' range as the population has decreased, or simply a lack of adequate observer effort in these areas (NMFS 1991).

Observation records show that northern right whales have become entrapped and entangled in fishing gear, resulting in scars, injuries, and death. Fishing nets and associated ropes are known to become entangled at three locations on the whale: Around a flipper, at the gape of the mouth, and around the tail (Kraus 1985). Gill nets are believed to be the primary cause of fishing gear-related scars and injuries, although whales have also become entangled in drift nets and lines from lobster pots, seines, and fish weirs (Kraus 1985). Fishing practices and locations may require special management considerations when the timing of the fishing season and the

presence of the northern right whale overlap.

Exploration and development for oil, gas, phosphates, sand, gravel, and other materials on the outer continental shelf may impact northern right whale habitat through the discharge of pollutants (such as oil, drilling muds, and suspended solids); noise from seismic testing, drilling, and support activity; and disturbance of the environment through vessel traffic and mining rig activity. If these types of activities are proposed their timing and location may also require special management considerations including the establishment and maintenance of buffer zones.

Activities That May Affect the Essential Habitat

Uses of the proposed areas overseen by Federal agencies may be in need of special management considerations, or protection, to ensure survival of northern right whales. Federal agencies affected by critical habitat designation of these areas include the U.S. Coast Guard, Environmental Protection Agency, U.S. Army Corps of Engineers, NMFS (including the New England Fishery Management Council and South Atlantic Fishery Management Council), National Ocean Service, Office of Coastal Zone Management, Minerals Management Service, and the U.S. Navy. These agencies would continue to be required to ensure that any activities authorized, funded, or otherwise conducted in the area do not significantly modify or negatively affect critical habitat.

Resource use in the proposed areas are currently, and have been historically, dominated by vessel traffic and fisheries. These activities account for the majority of human resource use associated with the proposed critical habitat areas. The potential impacts of these activities on the proposed critical habitat areas are discussed below.

In Cape Cod Bay, vessel traffic associated with the Cape Cod Canal, the Boston Harbor traffic lanes, dredging and disposal traffic, recreational boating, commercial fishing and whale watching comprise the majority of the vessel activity in the immediate area. Of these activities, recreational boating, commercial fishing, and whale watching contribute greatly to the level of activity in the proposed critical habitat area. Recreational boating begins with the onset of warmer months, particularly in June. Commercial fishing vessels and gear are dominated by the lobster industry, which does not typically begin its season prior to the middle of June. Whalewatching boats, ferries, or other vessels increase activity in the area in relationship to the onset of warmer weather and the tourist season and typically begin in May or June and end no later than October or November. There is no evidence to suggest these activities currently result in appreciable degradation to northern right whale habitat.

In the Great South Channel, vessel traffic and fisheries are the activities most representative of resource use within the proposed critical habitat area. However, in this area, these activities are not contingent on warmer weather. Shipping vessel traffic lanes for Boston Harbor are used throughout the year to import and export metal, salt, fuel, and a variety of other products. Similarly, the commercially important fishing grounds on Georges Bank involve year-round vessel traffic throughout the proposed area. The most dominant type of fishing gear used in this area is the bottom trawl. It is not known whether the bottom trawl, or other types of fishing gear, have an impact on the whale's habitat. Studies have demonstrated annual variability in the location and depth of observed northern right whale feeding in the Great South Channel (Kenney 1992). Commercial fishing in this area uses gear with mesh sizes that do not pose an immediate threat to the whale's planktonic food supply by impingement and subsequent depletion from the environment. In addition, groundfish trawling has been excluded from the area from February 1 to May 31 each year.

For the Georgia and Florida calving grounds, vessel traffic and fisheries continue to represent the activities that characterize the area's most concentrated resource use. Within the calving grounds, five major commercial shipping ports operate in the vicinity of the proposed critical habitat. Presumably, the majority of commercial fishing vessels that use the inshore waters to harvest shrimp and other commercially important species utilize these and other neighboring ports as well. Vessel traffic from recreational boating is also fairly extensive. It appears that, relative to the proposed areas in Cape Cod Bay and the Great South Channel, vessel traffic, is the greatest, in this proposed critical habitat area during northern right whale high use periods. Although designation of critical habitat will not impact the level of vessel traffic and fisheries that currently utilize the area, special management consideration may be needed to ensure maximum net productivity of the northern right whale population.

Other activities that could potentially alter northern right whale habitat or harm the species include dredge spoil disposal, municipal and industrial discharge, and mineral exploration. These activities will still require section 7 consultation. Designation of critical habitat in defined areas will help ensure that the habitat is not degraded, or, particularly in the case of the northeastern areas, that food sources are not appreciably degraded by indirect activities. Special management considerations for these activities may include a monitoring program that could be utilized to provide information relevant to potential impacts of direct or indirect activities on the marine system that provides food sources for northern right whales.

Expected Impacts of Designating as Critical Habitat

Designation of critical habitat in the proposed areas would not result in immediate and mandatory additional restrictions on use of the area. Therefore, direct economic impacts associated with designation of these areas are not anticipated.

Designation of critical habitat in these areas may result in an increase in administrative time and cost to Federal agencies that manage projects in the designated areas. However, these agencies are currently required to address habitat alteration issues in section 7 consultations, and as a result, any increase in administrative time or cost is expected to be minimal.

Proposed Critical Habitat; Essential Features

Cape Cod Bay

Cape Cod Bay is a large embayment on the U.S. Atlantic Ocean off of the State of Massachusetts. It is enclosed on the south and east by Cape Cod and on the west by the Massachusetts coastline. To the north, the bay opens to Massachusetts Bay and the Gulf of Maine. The Bay has an average depth of about 25 m, and a maximum depth of about 65 m. The deepest area of the Bay is in the northern section bordering Massachusetts Bay and the Gulf of Maine. Thermal stratification occurs in the Bay during the summer months. Surface waters typically range from 0 to 19 °C throughout the year. Salinity is fairly stable throughout most of the year at around 31–32 parts per thousand. Much of the bottom is comprised of unconsolidated sediments, with finer sediments occurring in the deeper waters (Davis 1984). In shallow areas, or where there is sufficient current, sediments tend to be coarser.

The late-winter/early spring zooplankton fauna of Cape Cod Bay consists primarily of copepods, which are represented predominantly by two species, *Arcartia clausi* and *A. tonsa*. Samples taken in the daytime indicated greater densities of copepods at greater depths. The copepod *Calanus finmarchicus*, shown to be an important food source to the northern right whale, has been found along inshore Cape Cod waters at densities of 100 individuals per cubic meter from approximately April to August. Waters in the Great South Channel, offshore of Cape Cod, have been found to support greater numbers of *C. finmarchicus* (closer to 1,000 individuals per cubic meter) from approximately April to December. This species is usually found at depths of 3 m and greater. *C. finmarchicus* ranges from as far north as Eastport, Maine and south to Cape Hatteras, North Carolina.

The area proposed for critical habitat designation is bounded by the following coordinates: 42°04.8′ N, 70°10.0′ W; 42°12′ N, 70°15′ W; 42°12′ N, 70°30′ W; 41°46.8′ N, 70°30′ W; and on the south and east, by the interior margin of Cape Cod, Massachusetts.

Great South Channel

The Great South Channel is a large funnel-shaped bathymetric feature at the southern extreme of the Gulf of Maine between Georges Bank and Cape Cod, Massachusetts. The channel is bordered on the west by Cape Cod and Nantucket Shoals and the east by Georges Bank. To the south, the channel narrows and rises to the continental shelf edge and deepsea canyons. To the north, the channel opens in to Murray and Wilkinson Basins. The average depth is about 175 m, with a maximum depth of about 200 m to the north near Wilkinson Basin. The channel becomes thermally stratified during the spring and summer months. Surface waters typically range from 3 to 17 °C between winter and summer.

Salinity is stable throughout the year at approximately 32–33 parts per thousand (Hopkins and Garfield 1979). Much of the bottom is comprised of silty, sandy sediments, with finer sediments occurring in the deeper waters.

The late-winter/early spring mixing of warmer shelf waters with the cold Gulf of Maine water funneled through the channel, causes a drastic increase in primary productivity in the area. The zooplankton fauna found in these waters are typically dominated by copepods, specifically *C. finmarchicus, Pseudocalanus minutus, Centropages typicus, Centropages hamatus,* and *Metridia lucens*. From the middle of winter to early summer, *C. finmarchicus* and *P. minutus* are the dominant species, which together made up between 60 and 90 percent of a sample (Sherman *et al.* 1987). In late spring *C. finmarchicus* alone makes up 60 to 70 percent of all sampled copepods. In the second half of the year, both species of *Centropages* dominate the waters, accounting for about 75 percent of all sampled copepod species. Other abundant taxa are euphausiids, cirripede larvae, coelenterates, chaetognaths, appendicularians and pteropods (Sherman *et al.* 1987).

The area proposed for critical habitat designation is bounded by the following coordinates: 41°40′ N, 69°45′ W; 41°00′ N, 69°05′ W; 41°38′ N, 68°13′ W; 42°10′ N, 68°31′ W.

Coastal Calving Grounds off Georgia and Florida

The proposed critical habitat for the southeastern Atlantic coast encompasses coastal waters between 31°15′ N. (approximately located at the mouth of the Altamaha River, Georgia) and 30°15′ N. (approximately Jacksonville, Florida) from the coast out to 15 nautical miles offshore; and the coastal waters between 30°15′ N. and 28°00′ N. (approximately Sebastian Inlet, Florida) from the coast out to 5 nautical miles. The coastal waters off Georgia and Florida have an average depth of about 30 m, and a maximum depth of about 60 m. The deepest area occurs along the coast of Florida, just south of Cape Canaveral. There is very little information on seasonal water temperature and salinity range for this area, although it is expected that temperature and salinities would be higher than northern waters.

Northern Florida is a transition area separating most subtropical and more temperate species of southeastern marine communities. There is quite a bit of seasonal and annual variation that occurs in this area, exhibited by large, cyclic changes in abundance and dominance of many plankton species. In fact, changes in abundance from year to year may be so great that monitoring studies conducted for only 1 or 2 years may not be sensitive enough to assess the temporal variability of the plankton community. Currently, there is little information available that describes the coastal marine plankton in this area. However, the recorded preferred food of the northern right whale, *C. finmarchicus*, does not occur in these waters.

The three areas described above represent 80 to 90 percent of the nothern right whale sightings within the described essential habitat.

Public Comments Solicited

NMFS is soliciting information, comments or recommendations on any aspect of this proposed rule from the public, concerned government agencies, the scientific community, industry, private interests, or any other interested party. NMFS will consider all comments received by the date specified (see **DATES**) in reaching a final decision.

Classification

The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), has determined that this is not a "major rule" requiring a regulatory impact analysis under E.O. 12291. The regulations are not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (3) a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The economic impacts specifically resulting from the designation of critical habitat, above the impacts attributable to listing the species from other authorities, are expected to be minimal. The General Counsel of the Department of Commerce has certified that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as described in the Regulatory Flexibility Act; therefore, a regulatory flexibility analysis is not required.

This proposed rule does not contain collection-of-information requirements for purposes of the Paperwork Reduction Act.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

The Assistant Administrator has determined that the proposed designation is consistent to the maximum extent practicable with the approved Coastal Zone Management Programs of the States of Massachusetts, Georgia, and Florida. This determination has been submitted for review by the responsible state agencies under section 3.7 of the Coastal Zone Management Act.

NOAA Administrative Order 216–6 states that critical habitat designations under the ESA, generally, are categorically excluded from the requirement to prepare an

environmental assessment or an environmental impact statement. However, in order to more clearly evaluate the minimal impacts of the proposed critical habitat designation, NMFS has prepared an environmental assessment. Copies of the assessment are available on request (see **FOR FURTHER INFORMATION CONTACT**).

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Sherman, K., W.G. Smith, J.R. Green, E.B. Cohen, M.S. Berman, K.A. Marti and J.R. Goulet. 1987. Zooplankton production and fisheries of the northwestern shelf. *In*: Backus, R.H. 1987. Georges Bank. MIT Printing Press, Cambridge, Massachusetts. 550 pp.

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: May 14, 1993.

Nancy Foster,

Acting Assistant Administrator for Fisheries.

For the reasons set forth in the preamble, 50 CFR part 226 is proposed to be amended as follows:

PART 226—DESIGNATED CRITICAL HABITAT

1. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

2. A new § 226.13 is added to subpart B to read as follows:

§ 226.13 Northern Right Whale (Eubalaena glacialis).

(a) Cape Cod Bay, Massachusetts—The area bounded by 42°04.8′ N, 70°15′ W; 42°12′ N, 70°15′ W; 42°12′ N; 70°30′ W; 41°46.8′ N; 70°30′ W; and on the south and east by the interior shore line of Cape Cod, Massachusetts.

(b) Great South Channel—The area bounded by 41°40′ N; 69°45′ W; 41°00′ N; 69°05′ W; 41°38′ N; 68°13′ W; and 42°10′ N; 68°31′ W.

(c) Southeastern United States—The coastal waters between 31°15′ N. and 30°15′ N. from the coast out 15 nautical miles; and the coastal waters between 30°15′ N. and 28°00′ N. from the coast out 5 nautical miles.

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