

**Regulatory Impact Review
of Proposed Rule to Delay a Broad-Based Gear Requirement and
Remove a Gear-Based Term under the Atlantic Large Whale Take Reduction Plan**

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**National Marine Fisheries Service
National Oceanic and Atmospheric Administration
Department of Commerce**

Regulatory Impact Review

The objective of Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993) is to improve the Federal regulatory system. The Regulatory Impact Review (RIR) is a required component of the process of preparing and reviewing regulatory actions and provides a comprehensive review of the economic impacts associated with a proposed action. The regulatory philosophy of E.O. 12866 stresses that in deciding whether and how to regulate, agencies should assess all costs and benefits of all regulatory alternatives and choose those approaches that maximize the net benefits to the society.

The RIR also serves as a basis for determining whether the proposed regulations are a “significant regulatory action” under the criteria provided in E.O. 12866.

The RIR must provide the following information: (1) a review of the problems and policy objectives prompting the regulatory proposals; (2) an evaluation of the major alternatives that could be used to meet the objectives; and (3) a comprehensive review of the level and incidence of economic impacts associated with the regulatory action. The RIR is intended to assist NMFS’ decision-making by selecting the regulatory action that maximizes net benefits to the Nation.

Review of the Problems and Policy Objectives

The Atlantic Large Whale Take Reduction Plan (ALWTRP) is designed to protect three endangered species – the western North Atlantic stock of right whales, the Gulf of Maine stock of humpback whales, and the western North Atlantic stock of fin whales – from the risk of serious injury and death associated with entanglement in commercial fishing gear. The ALWTRP consists of both regulatory and non-regulatory measures that, in combination, seek to assist the recovery of these large whale species.

Since implementation of the ALWTRP in 1997, the National Marine Fisheries Service (NMFS) has modified the plan on several occasions to address the risk of entanglement in commercial fishing gear. The most recent amendments, finalized in October 2007, expanded the scope of the plan to regulate additional fisheries, established new gear modification and marking requirements, and implemented a number of other regulatory changes (72 FR 57104, October 1, 2007; 73 FR 19171, April 9, 2008). With one major exception, these modifications are now in effect. The exception is a requirement that fisheries subject to the plan employ sinking and/or neutrally buoyant groundline. This requirement is scheduled to take effect 12 months after publication of the final rule; i.e., October 5, 2008. The one-year phase-in period was designed to provide commercial fishermen time to convert their gear and to ensure that an adequate supply of sinking and/or neutrally buoyant line would be available.

Since publication of the final rule, NMFS has monitored both the availability of sinking groundline and the progress of the fishing industry in converting to sinking groundline. Through these efforts, NMFS has determined that both the American lobster fishery and other trap/pot fisheries require additional time to convert to sinking groundline.

Accordingly, NMFS proposes to amend the ALWTRP to provide an additional six months (to April 5, 2009) for trap/pot fishermen along the Atlantic coast to comply with this requirement. Additionally, NMFS proposes to delete reference to “neutrally buoyant line” from the regulations, so that the rule specifically would require the use of sinking line. This modification is designed to eliminate confusion regarding the rule's requirements.

Evaluation of the major alternatives that could be used to meet the objectives

This RIR evaluates the implementation of a delay to a broad-based gear modification and removal of a gear-related term under the ALWTRP. The preamble to the final rule and Final Environmental Impact Assessment/Regulatory Impact Review (FEIS/RIR) on Broad-Based Gear Modifications to the ALWTRP (August 2007) are current and relevant to this action. Six regulatory alternatives were considered including a status quo (no action alternative). NMFS formulated the final rule by incorporating changes based on public comments and additional information received to decrease the number of affected vessels and result in reductions in compliance costs, while sacrificing little in terms of entanglement risk reduction. The proposed action is an administrative action that will provide for an extension of the original implementation date of six months for trap/pot fishermen along the Atlantic east coast for sinking groundline compliance. Additionally, this proposed rule would clarify the agency’s definition of approved line by deleting the “neutrally buoyant line” term and definition from the regulations to help clarify the intent of the agency and to aid in enforcement of the current regulations. This action is categorically excluded from the requirement to prepare either an Environmental Impact Statement or an Environmental Assessment under the National Environmental Policy Act.

Comprehensive review of the level and incidence of economic impacts

Regulatory impacts must be measured relative to a set of baseline conditions. For purposes of this analysis, the baseline is defined by the ALWTRP regulations currently in place, including the requirements published in October 2007. Thus, the impacts of interest are those associated with (1) eliminating references to "neutrally buoyant line" from the regulations, and (2) delaying the date by which trap/pot fisheries must employ sinking groundline from October 5, 2008, to April 5, 2009. The analysis focuses on these impacts.

Elimination of References to "Neutrally Buoyant Line"

As noted above, NMFS' proposal to remove references to "neutrally buoyant line" from the regulations is designed to eliminate a potential source of confusion for those who must comply with the ALWTRP's gear modification requirements. In their current form, the regulations refer to both “sinking” and “neutrally buoyant” line, with identical

definitions for each. These terms were used in the past, and NMFS employed both in the belief that this would promote better understanding of the regulations. Industry feedback since publication of the final rule, however, indicates that the use of the two terms has led to confusion about the type of groundline the regulations require. Additionally, industry has wondered whether NMFS will permit the use of "low profile" groundline in certain areas (the term "low profile" refers to line that does not sink, but would remain in the water column relatively close to the sea floor). NMFS is concerned that fishermen may confuse "neutrally buoyant" line with "low profile" line. Elimination of references to "neutrally buoyant line" from the regulations would make clear that sinking groundline is required. NMFS discussed the removal of the "neutrally buoyant line" term with the Atlantic Large Whale Take Reduction Team¹ at its April 2008 meeting and this suggested ALWTRP revision was supported.

Clarification of NMFS' regulations in the manner described is unlikely to impose any additional cost on the commercial fishing industry, nor is it likely to increase the risk that large whales will become entangled in commercial fishing gear. Instead, rectifying the confusion on this matter will reduce the chance that fishermen will spend time and money converting to line that fails to meet regulatory standards. To the extent that this occurs, the amendment will reduce the costs that fishermen incur in order to comply with ALWTRP requirements. As a practical matter, the clarification of requirements may also increase overall compliance with the regulations, thus reducing the risk to the species that the ALWTRP is designed to protect.

Delay of the Sinking Groundline Requirement for Trap/Pot Fisheries

Confusion over the type of line the regulations require and debate over potential changes to the regulations have slowed the commercial fishing industry's progress in converting to sinking groundline. The conversion process has also been slowed by confusion over which trap/pot fisheries are now subject to ALWTRP regulations. Prior to 2007, the only trap/pot fishery subject to ALWTRP requirements was the American lobster fishery. The amendments to the ALWTRP published in October 2007 expanded the scope of the plan to other trap/pot fisheries, including (but not limited to) those for crab (red, Jonah, rock, and blue), hagfish, finfish (black sea bass, scup, tautog, cod, haddock, pollock, redfish/ocean perch, and white hake), conch/whelk, and shrimp. In light of this situation, NMFS is proposing to delay the effective date of the sinking groundline requirement for trap/pot fisheries from October 5, 2008, to April 5, 2009.

The proposed delay in the effective date of the sinking groundline requirement would apply to the majority of vessels subject to this regulation. NMFS' analysis of the October 2007 amendments to the ALWTRP indicates that the amendments will affect an estimated 4,353 commercial fishing vessels, including 2,889 lobster trap/pot vessels and

¹ The Atlantic Large Whale Take Reduction Team (ALWTRT), a NMFS advisory group established under the authority of the Marine Mammal Protection Act (MMPA), is composed of representatives of the fishing industry, state and Federal resource management agencies, the scientific community, and conservation organizations. The purpose of the ALWTRT is to provide guidance to NMFS in developing and amending the ALWTRP to meet the goals of the MMPA with respect to Atlantic large whales.

431 other trap/pot vessels. The analysis also indicates that these trap/pot fisheries are likely to incur the majority of the costs imposed by the ALWTRP's new requirements. On an annualized basis, the estimated cost of compliance with the amendments totals \$13,398,300. The lobster fishery accounts for approximately 92 percent of this total, while other trap/pot fisheries account for an additional three percent.²

The estimates noted above reflect the cost of complying with all aspects of the amendments, not just those associated with the requirement to employ sinking groundline. NMFS' analysis does not provide an estimate of the costs attributable solely to the sinking groundline requirement. It does, however, provide considerable detail on the nature of these costs. They include:

- The material and labor costs associated with replacing floating groundline with sinking groundline, net of the costs that fishermen would ordinarily incur to replace worn-out groundline during the 12-month phase-in period;³
- An increase in operating costs thereafter, due to the expectation that sinking groundline will prove less durable than floating groundline; and⁴
- An expected increase in the rate of gear loss, with an associated increase in gear replacement costs.⁵

A six-month delay in the effective date of the sinking groundline standard would not eliminate the costs of complying with this requirement. Those who have already converted to sinking groundline would not realize any cost savings, and those who have yet to convert would still be required to do so by April 5, 2009.⁶ Those who have yet to complete the conversion, however, would be able to extend the process for an additional six months. This would reduce compliance costs, since more line could be converted when it ordinarily would need to be replaced, avoiding the costs associated with accelerating gear replacement. This would also help to smooth any potential spike in demand for sinking line, which, if it materialized, might temporarily outstrip the capacity of cordage manufacturers, drive up prices, and impair fishermen's ability to comply. Providing additional time would also reduce the possibility of a disruption in fishing effort during the summer and early fall of 2008, which would have an adverse impact on the catch and revenues of affected fishermen. Instead, fishermen would be able to bring

² Costs are presented in 2007 dollars and annualized using a real discount rate of seven percent. For additional information on the impacts of the 2007 amendments to the ALWTRP, see National Marine Fisheries Service, *Final Environmental Impact Statement for Amending the Atlantic Large Whale Take Reduction Plan: Broad-Based Gear Modifications*, August 2007.

³ See Appendix 6-C of the Final Environmental Impact Statement for information on material and labor costs.

⁴ According to NMFS gear specialists, floating groundline can last between five to ten years, depending on gear maintenance practices, sea bottom topology, weather, and other conditions. Sinking groundline is expected to have a shorter useful life because of increased contact with the sea bottom. As a result, fishermen may find it necessary to replace more fishing line each year.

⁵ Converting from floating to sinking groundline could lead to increased gear loss as a result of an increased incidence of "hang-ups" (line wrapping around rocks or other marine debris). Line that becomes snagged on the sea floor may break as it is hauled to the surface.

⁶ Those who have already converted to sinking groundline might include, for example, those who fish in areas where sinking groundline is already required at least part of the year, such as the Seasonal Area Management (SAM) zone or Cape Cod Bay Restricted Area. It would also include those who have taken advantage of floating groundline buyback programs in Maine, Massachusetts, New York, and the mid-Atlantic.

their gear into compliance during the winter, when fishing activity slows, fewer traps are in the water, and fishermen typically focus on gear repair and replacement.

Since 2005, NMFS has promoted trap/pot floating groundline buyback and recycling programs from Maine to North Carolina. Although these fishermen would not realize any cost savings from this action, the groundline buyback programs have helped defray some gear conversion costs for these fishermen. The programs are designed to ease the transition from floating to sinking groundline and the quantities of funding dispersed will significantly defray the burden associated with initial sinking groundline purchases. For example, the Whale Friendly Lobster Gear Replacement Program targeted Massachusetts inshore lobster trap/pot fishery, and upon trade in of floating line, fishermen received voucher covering 70% of cost of new line; fishermen covered 25% of new line cost and dealers discounted line by 5%. The Mid-Atlantic Gear Buyback and Recycling Program targeted Mid-Atlantic lobster trap/pot fishery and fishermen received full replacement (no cost sharing). As another example, for the Bottom Line which first's stage targeted state-licensed lobstermen fishing in Zone G and federally permitted lobster trap/pot fishermen, lobstermen receive \$1.40 per pound of floating line and participating vendors provide sinking line at a 5% discount (difference between sinking line selling price and \$1.40 trade-in price made up by lobstermen).⁷

The proposed delay in implementation of the sinking groundline requirement for trap/pot fisheries raises the possibility that large whales will be at an increased risk of entanglement in trap/pot gear from October 5, 2008, to April 5, 2009. NMFS believes, however, that the impact of the delay on large whales would be minimal. As previously noted, the delay would come at a time when less gear is in the water. It would also come before the primary seasonal distribution of large whales in the Northeast, where trap/pot activity is primarily concentrated. In particular, the distribution of right whales has a strong seasonal aspect; the northern feeding areas are occupied primarily from May through September. Although some right whales can be found in the area year-round, trap/pot fishermen who typically operate in special right whale management areas (e.g., the Cape Cod Bay Restricted Area or Seasonal Area Management zone previously established under the ALWTRP) are likely to have already converted to sinking groundline, as are trap/pot fishermen who have participated in line buyback programs. As a result of the floating groundline buyback efforts noted above, a substantial amount of floating groundline has been removed from the water, thus significantly reducing the risk of entanglement. In addition, all other ALWTRP requirements would remain in effect during this period. In light of these considerations, NMFS believes that the six-month delay in implementation of the sinking groundline requirement is unlikely to pose a significant risk to large whales.

⁷ See Chapter 7 of the Final Environmental Impact Statement for additional information on the effects of buyback programs.

Determination of Significant Regulatory Action

E.O. 12866 defines a “significant regulatory action” as one that is likely to result in: a) an annual effect on the economy of \$100 million or more, or one which adversely affects in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health and safety, or state, local, or tribal governments or communities; b) a serious inconsistency or interference with an action taken or planned by another agency; c) a budgetary impact on entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; d) novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principals set forth in E.O. 12866.

The preceding analysis shows that this proposed action would not constitute a “significant regulatory action” since it will not raise novel legal or policy issues and results in no negative impacts on gillnet and trap/pot fisheries. The proposed regulation will not have an annual impact on the economy of \$100 million or more. The proposed regulation will not adversely affect in a material way the economy, productivity, competition, public health or safety, jobs or state, local, or tribal governments. It does not interfere with an action planned by another agency. It does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients.

Regulatory Flexibility Act Analysis

The analytical requirements of the Regulatory Flexibility Act (RFA) are triggered by the issuance of a proposed rule. NMFS prepared a final regulatory flexibility analysis as part of the regulatory impact review, which describes the impact the recent ALWTRP amendment (72 FR 57104, October 1, 2007; 73 FR 19171, April 9, 2008) would have on small entities (August 2007). As this proposed action delays a requirement and makes an administrative change to this previous ALWTRP amendment, it will not result in costs beyond that previously analyzed. On this basis, the proposed rule may be judged not to have a significant economic impact on a substantial number of small entities. Accordingly, an initial regulatory flexibility analysis was not prepared.