given year on local or State governments or private entities.

Executive Order 12988

The Service has determined that these proposed regulations meet the applicable standards provided in Sections (a) and (b) of Executive Order 12988.

Federalism

This proposed rule would not have substantial direct effects on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Considerations

Pursuant to the requirements of the National Environmental Act of 1969 (42 U.S.C. §§ 4321–4347), this action is excluded because it involves issuance of routine, recurring, or special regulations (516 DM 6, Appendix 1.4.H).

Primary Author

Greg Weiler, Division of Refuges, U.S. Fish and Wildlife Service, Washington, DC, is the primary author of this rulemaking document.

List of Subjects in 50 CFR Part 30

Animals, Range management, Wildlife refuges.

Accordingly, part 30 of Chapter 1 of Title 50 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 30—RANGE AND FERAL ANIMAL MANAGEMENT

1. The authority citation for part 30 is revised to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 668dd, as amended; 16 U.S.C. 715i, as amended; 41 CFR 101–44.

2. Section 30.2 is revised to read as follows:

§ 30.2 Disposition of surplus range animals.

Disposition shall be made only during regularly scheduled disposal program periods, except in the event of exigent circumstances affecting the animals, their range, or the recipient. The Refuge Manager is responsible for determining the existence of ''exigent circumstances.'' Surplus range animals may be disposed of, subject to State and Federal health laws and regulations, by donation for specific purposes to public agencies, public institutions, other governments or charitable institutions, or sold on the open market.

Dated: May 9, 1996.

George T. Frampton, Jr.,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 96–20016 Filed 8–6–96; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 217 and 222

[Docket No. 960730211–6211–01; I.D. 072296B]

RIN 0648–AJ03

North Atlantic Right Whale Protection

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

ACTION: Proposed rule; request for comments.

SUMMARY: The northern right whale (*Eubalaena glacialis*) has been recognized as the world's most endangered large whale species. Recent mortalities off the Atlantic coast of the United States place the western Atlantic population of the northern right whale in an even more precarious position. Vessel interactions are identified as one of the major threats facing these whales, especially collisions with, and disturbances to whales. NMFS proposes to prohibit all approaches within 500 yards (460 m), whether by vessel, aircraft or other means. The proposed rule would restrict head-on approaches to northern right whales, would prohibit any vessel maneuver that would intercept a northern right whale within 500 yards (460 m), and would require northern right whale avoidance measures under specified circumstances. Exceptions would be provided for emergency situations and where certain authorizations are provided.

DATES: Written comments must be received on or before November 5, 1996.

ADDRESSES: Comments on the proposed rule should be addressed to Chief, Marine Mammal Division, Office of Protected Resources (FPR), NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Comments regarding the burden-hour estimates or any other aspect of the collection of information requirements contained in this proposed rule should be sent to the above individual and to the Office of Information and Regulatory Affairs, OMB, Attention: NOAA Desk Officer, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Margot Bohan or Michael Payne, NMFS/FPR, 301–713–2322; Doug Beach, NMFS/Northeast Regional Office, 508–281–9254; or Kathy Wang, NMFS/Southeast Regional Office, 813–570–5312.

SUPPLEMENTARY INFORMATION:

Background

Species Description and Summary of Status

The global population of right whales (*Eubalaena spp.*) is comprised of two separate species, the northern right whale located in the northern hemisphere, and the southern right whale (*E. australis*) in the southern hemisphere. Each species consists of several stocks or populations.

The northern right whale is the large whale species most in danger of becoming extinct in the near future (The Final Recovery Plan for the Northern Right Whale, NMFS, 1991) (Recovery Plan). The Right Whale Recovery Team (Recovery Team) concluded in the Recovery Plan that the low numbers of this species in each population, and the apparently low population growth rates, stand in alarming contrast to other right whale populations in the southern hemisphere, as well as other large whale populations worldwide.

In the Pacific, at least two populations of northern right whales are thought to occur. A 1973 estimate of the Pacific populations of the northern right whale, based on sighting data collected during the 1960s, was 100–200 animals (Wada, 1973). However, the western Pacific population (found primarily in the Sea of Okhotsk) may comprise most of this estimate. In the eastern North Pacific only a few sightings of individual animals have occurred during the past several decades. Therefore, a reliable estimate of abundance for the eastern Pacific population of the northern right whale is currently not available (Small and DeMaster, 1995).

In the North Atlantic, at least two populations of right whales, an eastern and a western population, also occur, or have occurred in the past. The eastern North Atlantic population may be nearly extinct. Between 1935–85, there were only 21 possible sightings, totaling 45 individuals, and Brown (1986) considered only five of these sightings (seven individual whales) to be confirmed.

The western Atlantic population of the northern right whale (hereafter ''right whale'' refers to this population unless otherwise stated) is the population that inhabits waters off the east coast of United States. The minimum population for the western North Atlantic population (based on known photo-identified individuals) was estimated to be 295 animals (See U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments, NMFS (1995), 60 FR 44308, August 25, 1995). In recent decades, the growth rate of this population may not be significantly different than zero.

In the 12 months prior to this proposed rule, there have been 9 confirmed right whale mortalities. Two known mortalities occurred in 1995 in middle and late summer along the coastlines of Rhode Island and Canada. Seven mortalities were documented in the first three months of 1996. Five, possibly six, right whale deaths occurred during January and February 1996, in the calving grounds off Georgia and northern Florida. These mortalities included one adult male, one adult female and three calves. Several carcasses were observed, but could not be retrieved for necropsy or identification. The most recent known right whale mortality occurred near Cape Cod, Massachusetts, May 1996. Because so few individuals are left in the population, these recent mortalities are a matter of extremely serious concern.

Distribution

Like other baleen whales, right whales in the western Atlantic are migratory. The five primary habitats used by right whales during their annual migration, as described by Kenney, Winn and Macaulay (1994), include a spring/early summer feeding and nursery area for a majority of the population in the Great South Channel, a late winter/spring feeding and nursery area for a small portion of the population in Cape Cod Bay (CCB), a winter calving ground and nursery area in the coastal waters of the southeastern United States (SEUS), a summer/fall feeding and nursery area for some animals, including nearly all mother/calf pairs, in the lower Bay of Fundy, and a summer/fall feeding ground, with almost exclusively mature individuals, on the southern Nova Scotian shelf. On June 3, 1994, NMFS designated the first three areas as critical habitat for the northern right whale (59 FR 28793).

Also, during 1996, aerial surveys were conducted in areas adjacent to, but offshore and south of, the SEUS. These flights were conducted because, during each of the two previous calving seasons, at least some of the right whales observed in the area within each season apparently moved out of the SEUS during mid-winter and their distribution was unknown during that period. Aerial flights also were conducted in 1996 in response to reports of dead right whales in the waters east of the SEUS.

During 1996, four surveys were flown offshore of the SEUS resulting in four sightings of right whales. These sightings included a group of four whales, another mother and calf pair, a dead whale, and a sighting for which the number of whales could not be documented. Additional surveys are planned for the winter of 1996–97 in an attempt to determine, and more precisely characterize, the offshore distribution of right whales during the winter season.

Human Interactions With Right Whales

Human interactions with right whales are a very serious problem for right whales in the western North Atlantic. In particular, where human activities coincide with the distribution of right whales off the east coast of the United States, especially where vessel traffic and similar activities occur, there is the potential that right whales may be disturbed or their behavior otherwise altered, or that they may be injured or killed.

Right whale behavior (i.e., resting at the surface, surface skim feeding, and surface courtship activity), and their slow swimming speed relative to other large whales, make the right whale particularly susceptible to close approaches and disturbances by humans. Additionally, due to their distribution in coastal waters with high levels of human activity, the western North Atlantic population of the right whale is particularly vulnerable to human interactions.

With the exception of a few neonates, most known right whale deaths appear related to human activity. Incidents of human interactions with right whales are becoming more evident with increased efforts to retrieve carcasses and more extensive survey efforts. Collisions with ships and entrapment or entanglement with fishing gear are the primary human-induced causes of right whale mortalities and serious injuries. Ship strikes are a major cause of mortality, producing an estimated mortality rate of between 0.8 and 1.4 right whales per year (NMFS, 1995).

The Recovery Plan also recognizes that disturbance is another human-induced factor that may impede the recovery of the population in the western North Atlantic. It is known that disturbance by vessel activities can change behavior in other species of whales. Studies of baleen whales other than right whales, including the bowhead (*Balaena mysticetus*) and gray whales (*Eschrichtius robustus*), clearly document a pattern of short-term, behavioral disturbance in response to a variety of actual and simulated vessel activity and noise (Richardson et. al, 1985; Malme et. al, 1983). Studies of bowhead whales revealed that these whales oriented themselves in relation to a vessel when the engine was on, and a significant avoidance response was invoked simply by turning the engine on, even at a distance of approximately 3,000 ft (900 m). Studies of humpback whales (*Megaptera novaengliae*) on their summering grounds, as summarized by Baker and Herman (1989) and on their wintering grounds, as summarized by Bauer (1986), found similar patterns of disturbance in response to vessel activity.

Similarly, NMFS has recognized that approaches to marine mammals by aircraft below certain altitudes has the potential to harass marine mammals and has imposed restrictions on these types of approaches as conditions in various permits. Finally, although rare, deliberate approaches to whales and other marine mammals have occurred. Reports of people in close proximity to whales or other marine mammals include ''buzzing'' incidents, where a person on a thrill craft (''jet ski'') or other watercraft deliberately approaches a marine mammal, swimming and scuba activities near marine mammals, touching or petting incidents, photography or video activities and similar types of reports. Obviously, such activities may involve the risk of disturbing or harassing marine mammals.

Studies, observations and other information on the effects of disturbance on right whales are more limited and less conclusive than information concerning some other species, but the available evidence suggests that human-induced disturbance, such as by vessel activity, may change right whale behavior, displace cow/calf pairs, and break up food sources. Whether right whales react to disturbance depends both upon the type and level of the disturbance, and upon the behavior in which the right whales are engaged when the disturbance occurs.

Low-level engine noise and minor vessel maneuvering may not induce a reaction from right whales (Watkins, 1986). If the disturbance is intense, however, right whales may be forced to dive to avoid impact or other perceived

threats, to temporarily leave an area or reroute their migratory path, to expend energy in avoidance behavior, or to otherwise alter their behavior.

Courtship activities and surface skim-feeding are examples of behaviors where right whales generally appear unresponsive to low-level disturbance. In contrast, avoidance reactions to disturbance may be most significant for calves, or females with calves, animals that are the reproductive core of the population and essential for recovery. Vessel activity may displace a female with a calf from nearshore waters or interrupt nursing or similar behavior. Calves have been observed to exhibit avoidance behavior in response to the sound of vessels (NMFS, 1991).

In addition to disturbances caused by vessel movement or noise, vessels may affect right whales indirectly. For example, feeding behavior may be interrupted or affected as a result of a vessel breaking up dense surface zooplankton patches in certain feeding areas.

Furthermore, while most studies and observations have focused on the short-term responses of whales to disturbance, long-term exposure to vessel traffic, to multiple vessels operating in close proximity, or to other close human contact may have a cumulative adverse impact on whale behavior.

Significantly, if whales become habituated to vessels and related activity, they may become especially vulnerable to vessel collisions or other adverse impacts. Preliminary results of a right whale study that was based on a small data set indicated that both within 100 meters and at distances beyond 100 meters, right whales, at first, oriented themselves away from vessels, but subsequently, no deviation in behavior could be detected (CMC, 1988). Although these results should be used cautiously, it is possible that they indicate some degree of right whale habituation to vessels. Because of the resulting increased risk of vessel collision, this type of habituation may pose a more significant peril to whales than avoidance behavior.

NMFS has concluded that the effects of vessel interactions and close approaches to right whales could have consequences that may be jeopardizing the continued existence and impeding the recovery of the population.

Summary of Vessel and Related Activities

Vessel and aircraft activities occur off the east coast of the U.S. throughout the range of the right whale. These activities include recreational and commercial fishing vessels, commercial cargo and other commercial vessels, recreational boats, whalewatch boats, and military vessels. Aircraft, including fixed wing aircraft and helicopters, also fly throughout the range of the right whale.

Following are some, but not necessarily all, of the vessel activities that occur in areas of high-use by right whales, including both critical habitat areas and certain waters adjacent to critical habitat areas (right whale high-use areas).

In CCB, commercial vessel traffic associated with the Cape Cod Canal and the Boston Harbor traffic lanes, recreational boating, and commercial fishing and whale-watching activities comprise the majority of the vessel activity in the immediate area. Of these, recreational boating, commercial fishing and whale-watching contribute greatly to the level of activity in right whale high-use areas.

Recreational boating is largely a seasonal phenomenon increasing with the onset of warmer months, particularly in June. Commercial fishing vessels (primarily lobster fishing) and the placement of gear, generally begin their season in the middle of June. Whale-watching boats usually begin operations in late March or April, when whales first arrive to the area, and increase their activity with the onset of warmer weather and the tourist season. The whale-watching season typically ends by mid-October.

In the southeastern United States, vessel traffic and fisheries are the major activities in, and adjacent to, the calving grounds. Major commercial shipping and military activity also occurs near or in the SEUS. Recreational boating traffic is also fairly extensive.

Aircraft activity at altitudes that may affect or disturb right whales is thought to be concentrated in areas near population centers and to be limited primarily to private aircraft that are involved in deliberate approaches to whales.

Existing and Related Regulations and Guidelines

State right whale approach restrictions: Massachusetts has implemented a 500 yard (460 m) buffer zone between right whales and vessels. Under Massachusetts' regulations it is unlawful for a vessel to approach within 500 yards (460 m) of a right whale; to turn in a manner to intercept a right whale within 600 yards (550 m) thereof; or not to depart immediately from the buffer zone if a right whale surfaces near the vessel. The regulations apply within the territorial and inland waters of the Commonwealth of Massachusetts and certain exceptions are provided (See 322 Code of Massachusetts Regulations, 12.00 *et seq.*).

Approach restrictions for humpback whales: NMFS has implemented approach restrictions similar to those proposed here to protect humpback whales in certain areas off Hawaii although those restrictions apply to approaches within 100 yards (90 m) rather than 500 yards (460 m) of a whale (See 50 CFR 222.31).

Similarly, the National Park Service prohibits the operation of any vessel within one-quarter of a nautical mile (460 m) of a humpback whale on navigable waters within Glacier Bay National Park. Instructions are provided on what actions to take if a vessel finds itself within this area and various exceptions are specified (See 36 CFR 13.65).

Whale-watching guidelines: Under present whale-watching guidelines issued by NMFS for the New England area, vessels conducting whale-watching operations are directed to remain at least 100 ft (30 m) from all whales. In the area from 100 to 300 ft (30–90 m) of a whale, there may be no more than one boat and that boat must not operate in excess of idle speed and must avoid head-on approaches toward the whale. In the area between 300 and 600 ft (90–180 m) of a whale, there may be no more than three boats and those boats must avoid head-on approaches. The area between 600–1500 ft (180–460 m) of a whale is referred to as the ''whale awareness zone'' and boats in this zone must not change course or speed suddenly and must not use excessive speed.

Background to Proposed Rule

Recommendations of the Recovery Team: As noted above, the Recovery Team concluded in the Recovery Plan that disturbance was among the principal human-induced factors impeding right whale recovery and recommended that regulations be promulgated that: (1) Establish minimum approach distances for the northern right whale, (2) require a vessel to maintain speed and direction should a northern right whale surface within this minimum approach distance, and (3) prohibit a vessel from approaching a northern right whale or turning in any manner to intercept a whale.

This proposed rule addresses the recommendations of the Recovery Team by proposing to prohibit close approaches to right whales by vessels or other means.

Petition for rulemaking: On October 5, 1994, NMFS received a petition from GreenWorld, Inc., requesting that NMFS issue regulations establishing a 500-yard

(460-m) radius protection zone around every right whale and, citing the similarity of appearance provision of section 4(e) of the Endangered Species Act (ESA), 16 U.S.C. 1533(e), a 100-yard (90-m) radius protection zone around all other whales. The petition also asked that any approach closer than 500 yards (460 m) (or 100 yards (90 m) for every other whale species) be considered an incidental take under the ESA.

This proposed rule addresses the GreenWorld request by proposing to prohibit approaches within 500 yards (460 m) of right whales although NMFS does not propose to use the similarity of appearance provision, nor does it propose that close approaches should be considered an incidental take although certain approaches to right whales would be prohibited by regulation. Likewise, NMFS is not proposing to restrict approaches to whale species other than the right whale. NMFS has considered similar proposals in the past. On August 3, 1992, NMFS published a proposed rule of general applicability to protect whales, dolphins and porpoise from activities associated with whale watching and to establish minimum approach distances (See 57 FR 34101). That proposal was withdrawn on March 29, 1993, in part, because it was viewed as being too broad in scope (See 58 FR 16519). At that time, NMFS began an initiative to concentrate initial efforts on marine mammal approach problems on a more species-specific and region-specific basis. This proposed rule is a part of that initiative.

Comments on other rulemaking: Following publication of the proposed rule to designate critical habitat for the northern right whale (58 FR 29186, May 19, 1993), NMFS received several comments in support of a ''distance buffer'' that would be established around northern right whales. One commenter recommended that approach restrictions for all vessels around right whales be established and suggested a distance of 100 m to 300 m. A second commenter recommended that NMFS establish around every right whale, in any area designated as critical habitat, a 500 m radius ''protection zone,'' and prohibit any vessel or person from entering or knowingly remaining within this zone. The commenter further suggested that such a buffer zone be consistent with similar rules that have already been adopted by NMFS and the State of Massachusetts.

In the final rule designating critical habitat, NMFS responded to those comments (59 FR 28793, June 3, 1994) stating that, in both cases, the purpose of the buffer zones would be to ensure that vessels were kept far enough away from right whales, so that the animals would not be disturbed and would not be in danger of collision with a vessel, in as much as possible, throughout their range. Critical habitat designations reflect the identification of specific geographical areas containing physical or biological features essential to the conservation of the species, and NMFS determined that, while recognizing that the area around each right whale is important, it is not appropriate for a critical habitat designation.

At that time, NMFS stated that buffer zones around right whales should be established through separate rulemaking, similar to the special prohibitions for humpback whales in Hawaii (See 59 FR 28800, June 3, 1994). This proposed rule constitutes part of that separate rulemaking process.

Advance notice of proposed rulemaking (ANPR): On December 27, 1994, NMFS published an ANPR concerning the establishment of protection zones around right whales (59 FR 66513). The ANPR was initiated in response to the recommendations of the Recovery Team, to the petition, and to other comments received. The ANPR requested comments on the petition and the need for and types of conservation measures that would be effective in minimizing human-induced interactions with northern right whales. In response to several requests, the comment period for the ANPR was extended until April 3, 1995 (60 FR 11951, March 3, 1995).

Numerous comments on the ANPR were received. Comments were submitted by environmental groups, state and local government spokespersons, representatives of industry and private citizens. Comments were mixed in their support for and opposition to the implementation of right whale conservation measures. These comments were considered in the preparation of this proposed rule.

Description of Proposed Regulatory Measures

Summary of the proposed rule: There is good reason to believe that if the full range of human impacts specified by the Recovery Team were reduced, the chance for species recovery would be maximized. In order to minimize the risk that human activities will disturb or cause other behavioral changes in right whales and to reduce the risk of vessel collisions and other interactions with right whales, NMFS proposes:

(1) To prohibit or limit certain activities that may affect right whales, especially activities within 500 yards (460 m) of a right whale. Except under very limited circumstances, all approaches within 500 yards (460 m) would be prohibited, whether by vessel, aircraft or other means. NMFS proposes to use the definition of ''vessel'' found in the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS) (see 33 CFR Part 81 App. A, Part A, Rule 3) and in the Inland Navigation Rules (see 33 U.S.C. 2003), which includes surfboards, thrill craft or ''jet skis,'' and all other types of water craft used or capable of being used for transportation.

(2) To prohibit head-on approaches to a right whale from any distance once a right whale is sighted by an operator exercising due diligence and once the operator has had time to alter the heading of the vessel or craft accordingly.

(3) To prohibit the positioning of a vessel in the path of a right whale.

(4) To require right whale avoidance measures.

Right whale avoidance measures would be those actions necessary to avoid takings prohibited under the MMPA or the ESA, actions necessary to comply with instructions from NMFS, the U.S. Coast Guard and other agencies concerning the avoidance of right whales and, if a person, aircraft, vessel or other object is within 500 yards (460 m) of a right whale, certain steps to increase the person or object's distance from the whale.

The proposed rule provides specific guidance concerning how to increase one's distance from a right whale: (1) Sudden changes in operation are to be avoided unless necessary to avoid striking or injuring a right whale or for safe vessel or aircraft operation, (2) if one is already moving away from a right whale, approximately the same speed and direction should be maintained, (3) if one is moving toward a right whale, expeditious efforts should be made to reduce speed and to change direction away from the whale, (4) if one is approached by a whale, the person or object should move slowly but deliberately and steadily away from the whale. These requirements are not applicable under certain circumstances such as when a vessel is not underway.

Finally, the proposed rule contains an exception for emergency situations where there is a threat to the safety, health or life of a person, a significant threat to a vessel or aircraft, or a threat to the safety, health or life of a right whale, and an exception for approaches to or activity in the proximity of right whales specifically authorized in a scientific research permit, an incidental take statement, incidental take permit or similar authorization issued by NMFS. Issues considered and the applicability

of proposed measures to specific situations.

The size of the buffer zone: In preparing this proposed rule NMFS considered a variety of options. In particular, various alternatives were considered before proposing the 500-yard (460-m) buffer area around right whales. The status quo was considered inappropriate given the status of these critically endangered whales. Likewise, there was concern that a 100-yard (90–m) zone might not be large enough to conserve right whales although it was recognized that evidence of harassment or behavioral changes induced by disturbances beyond this distance was sketchy.

Generally, NMFS wanted to maximize the area of protection around right whales to avoid any potential for disturbance or behavioral changes and to reduce, if possible, the risk of collision. While NMFS considered a 1000-yard (920-m) buffer zone, NMFS concluded that right whales could not be identified at that distance and that a 500-yard (460-m) no-approach area would be the most appropriate.

Situations where the identification of the whale species is uncertain: In some situations it may be difficult for a person to differentiate between a northern right whale and another species of large whale at a distance of 500 yards (460 m) although the Recovery Team indicated that persons with knowledge or training could identify right whales at this distance.

Thus, in order to ensure compliance with the mandates concerning right whales in the proposed rule, a person would be expected to avoid close approaches to all large whales that cannot be identified as to species in waters along the east coast of the United States, especially in right whale high-use areas when those whales are expected to be present.

NMFS has concluded that a 500-yard (460-m) buffer zone would allow people to observe right whales (and other large whales if they are unable to identify the species with certainty) while providing a measure of protection and safety for these animals consistent with sound management practices and the recommendations of the Recovery Team.

Applicability to various approach activities: The proposed rule would apply broadly to approaches by vessels, aircraft or other means. NMFS recognizes that many small vessels, vessels travelling at very slow speeds, swimmers, aircraft and certain other types of close-approaches have little or no potential to cause serious injury to right whales; nonetheless, such approaches would be prohibited. First, close human contact has the potential to disturb or harass a right whale even if it does not result in injury. For example, if right whales become habituated to small vessels or vessels operating at slow speeds and fail to dive and orient themselves away from vessels, then they may become more vulnerable to larger vessels or vessels travelling at higher speeds. Next, while not currently a serious problem, NMFS wants to discourage potential activities such as airplane or helicopter whale-watching operations or other activities that could disturb or cause behavioral changes in right whales. Finally, a 500-yard (460-m) no-approach prohibition is much easier for the public to understand and easier to enforce than the more general prohibition on harassment. NMFS has concluded that this type of regulation will minimize risks and potential risks and would be justified given the precarious status of right whales .

Applicability of proposed rule to whale-watching operations: Right whales are the object of commercial whale-watching activities primarily in two areas: CCB in the late spring (mid-March through mid-May), and the lower Bay of Fundy in the late summer and fall. As stated earlier, the Recovery Plan recommends that regulations be promulgated limiting close approaches to right whales, including approaches by whale-watching vessels. Generally, whale-watching operations focus on several other large baleen whales, notably the humpback whale and the finback whale (*Balaenoptera physalus*). However, during early spring, or during those few years when right whales are the only large whale species available for viewing (1986 on Stellwagen Bank was the exceptional year for right whales), several whale-watching vessels may remain around right whales throughout the day or over a period of several days or even weeks.

It should be emphasized that this rule would apply only to vessel-approaches near right whales. Vessels operators conducting whale-watching activities in Massachusetts waters already are subject to the 500-yard (460-m) right whale buffer zone created by Commonwealth law. This proposed rule is designed to be compatible with that law.

Whale-watching vessels are not thought to present any significant risk of serious collision with right whales because an intense lookout for whales is usually maintained on these vessels and because of the way such vessels are handled. Compliance with whale-watching guidelines generally has been very good. On the other hand, the possibility of disturbances caused by vessels and the risk that right whales may become acclimated to vessel activity, as described above, does exist.

Even if current levels of whale-watching activity do not present a major or immediate direct threat to right whales, NMFS is concerned about human-induced changes to right whale behavior resulting from existing operations as well as potential future developments in this industry. Likewise, NMFS is concerned that related activities, such as aircraft whale-watching rides, could occur. NMFS wants to ensure that such activities do not develop and that the public recognizes that close encounters with right whales should be avoided under all circumstances.

Vessel approaching a right whale versus a right whale approaching a vessel: A vessel would not necessarily be in violation of the proposed regulation merely by being inside the proscribed 500-yard (450-m) area unless there is evidence that the vessel approached the right whale or that the vessel was turned, maneuvered or positioned in a manner designed to intercept a right whale. Rather, if a vessel is approached by a right whale or if a right whale surfaces near a vessel, the vessel would be required to undertake required right whale avoidance measures promptly. If a vessel remained within the proscribed area and failed to undertake the required avoidance measures, the owner or operator would be in violation of the proposed rule.

Deliberate versus unintentional approaches: Approaches to right whales, whether deliberate or unintended, present the potential serious problems described above. Disturbance of right whales may be more likely when approaches are intentional because such contact may be closer in proximity, more prolonged, or more intense. On the other hand, ship strikes and serious injuries and mortalities may be more likely to result from accidental approaches.

While intentional misconduct sometimes is considered especially culpable, it is important to note that the prohibitions on takings imposed under the MMPA and the ESA are not limited to intentional takings but also include unintentional or incidental takings as well. Similarly, regulations prohibiting approaches to humpback whales off Hawaii apply to unintentional as well as intentional approaches. In some cases, it may be appropriate to use enforcement discretion in deciding whether to bring an enforcement action against someone who accidentally approaches a whale,

but because of the risk that unintentional approaches may cause the injury or mortality of a right whale, such approaches would be prohibited under this proposed rule and all persons who are concerned about their responsibility for unintentional approaches are urged to use extra caution. Experience in Hawaii suggests that problems understanding, interpreting and enforcing the approach prohibition may be relatively minor.

Vessels at anchor or mooring: The proposed rule would not apply to anchored vessels. A vessel at anchor can not approach a right whale, and the proposed rule specifically states that whale avoidance measures are not applicable to vessels that are not underway, that is, vessels that are anchored, made fast to the shore, or aground.

In addition, it is unlikely that the proposed rule would prevent access to safe anchorages or harbors since, in most circumstances, a vessel still would have room to maneuver and approach the harbour or anchorage even if a right whale was in the vicinity.

Applicability of proposed rule to research and fishing operations: While the proposed rule would apply to all vessels, it is not expected to interfere unreasonably with research or fishing operations. Research on northern right whales for which a permit is issued under the ESA or MMPA would be exempt from the proposed rule. With respect to other types of research, researchers would be encouraged to use areas where, or seasons when, right whales are unlikely to be present, or would need to contact NMFS to explore ways to conduct the research without adverse impacts on right whales.

Fishing operations normally are conducted at vessel speeds that do not pose a significant threat to right whales and, as a result, the vessel operator is expected to have time to take action to avoid approaches to right whales that would be prohibited by this proposed rule. Nevertheless, certain operations, such as hauling back a tow, can limit a vessel's maneuverability. Such operations should not be initiated if a right whale is sighted, and certainly should not begin if the right whale is within or almost within 500 yards (460 m) of the vessel.

If haulback operations are initiated and a right whale subsequently approaches the vessel, under most circumstances, the haulback should be completed because of safety concerns and requirements for safe vessel operation. By statute, the vessel must take all reasonable actions in order to avoid violating the ESA and MMPA prohibitions on ''takes.'' Once the operation is completed or maneuverability is again unrestricted, the vessel should move slowly but deliberately and steadily in a direction away from the right whale in accordance with the right whale avoidance measures.

Maintaining a lookout and exercising due diligence: Currently, vessel operators are required by COLREGS, Rule 5 (See 33 CFR Part 81 App. A, Part B, Section 1, Rule 5) and by Rule 5 of the Inland Navigation Rules (33 U.S.C. 2005) to maintain a proper lookout. That lookout should use all available means appropriate under the circumstances to watch for whales, especially right whales. If the vessel is in an area (and time) where right whales are known to occur, or may be expected to occur, additional care is required. If vessel operators do not maintain an adequate whale lookout or fail to exercise due diligence, ship strikes of northern right whales, while unintended, are likely to continue to occur.

NMFS is cooperating with the U.S. Coast Guard, several port authorities, the U.S. Navy, state agencies and other parties to increase knowledge and awareness of the location of northern right whales generally as well as the location of specific right whales in shipping lanes or in areas with a high concentration of shipping. This proposed rule would require vessel operators to exercise due diligence to avoid head-on approaches to right whales. Similarly, vessel operators would be required to comply with instructions received from NMFS, the U.S. Coast Guard, the U.S. Navy, or port authorities concerning measures necessary to avoid approaches to right whales.

Appropriate speed: In order to avoid prohibited approaches to right whales, it may be necessary for certain vessels, especially large ships, to reduce speed. Currently, vessel operators are required by COLREGS, Rule 6, to proceed at safe speed so that the vessel can take proper and effective action to avoid collision and ''be stopped within a distance appropriate to the prevailing circumstances and conditions'' (72 COLREGS, see 33 CFR Part 81 App. A, Part B, Section 1, Rule 6). An identical requirement is imposed under the Inland Navigational Rules, 33 USC 2006.

Under circumstances where right whales are known to occur, or may be expected to be in the area where a vessel is operating, a ''distance appropriate to the prevailing circumstances'' would be at least 500 yards (460 m) from a right whale.

Vessels restricted in their ability to maneuver or in certain areas: NMFS recognizes that special circumstances sometimes restrict a vessel in its ability to maneuver, that a vessel is sometimes constrained by its draft, and that often there is a need to stay within shipping lanes or within designated channels. While right whales may avoid some channels, port areas, traffic routes and shallow water areas, clearly, collisions with right whales can occur in these places. In fact, collisions with whales may be more likely in areas or under circumstances of limited maneuverability and in these situations it is particularly important to avoid approaches within 500 yards (460 m) of a right whale.

In order to avoid prohibited approaches to right whales in these situations, extra caution including additional efforts to maintain a lookout or additional reductions in speed may be necessary.

If a right whale is positively identified and observed near a port, in a channel, in an established shipping lane, or in others areas with a high concentration of shipping activity, a vessel operator should report the sighting to the U.S. Coast Guard or the appropriate port authority, and request assistance, if appropriate. Knowledge of the location of right whales may help prevent potential collisions and allow vessels to implement appropriate whale avoidance measures.

Likewise, where the presence of a right whale would inhibit the entry of a large ship into a port or otherwise interfere with vessel operations, a vessel operator should contact the U.S. Coast Guard or port authority for assistance or instruction.

Aircraft: Approaches by aircraft below certain altitudes have been recognized by NMFS to have the potential to harass marine mammals. The proposed rule would prohibit an aircraft from approaching or circling over a right whale at an altitude below 1500 ft (460 m). NMFS has imposed restrictions on low altitude approaches to certain marine mammals as a condition on various permits. In most cases, however, the specified altitude is between 500–1000 ft (150–310 m). Given the precarious status of right whales, NMFS is proposing an altitude restriction that will minimize the possibility of the disturbance of these whales .

NMFS recognizes that there may be some commercial and military use of air space in certain areas where right whales may occur and solicits comments on the feasibility of this proposed restriction in those areas.

Jurisdictional applicability: The proposed rule would apply to all persons, vessels and aircraft subject to the jurisdiction of the United States. The proposed rule also would state clearly NMFS' interpretation of U.S. jurisdiction within the territorial sea and the U.S. exclusive economic zone (EEZ).

The proposed rule includes a definition of the term ''territorial sea.'' In 1988 the President issued a proclamation extending the breadth of the territorial sea for international purposes from three miles to twelve miles from the baseline. Whether this proclamation has an effect on a particular Federal statute depends upon whether the statute uses the term ''territorial sea'' in an international sense, i.e., linked to the extent of the territorial sea for international purposes, or in a domestic sense. Sections 9 and 10 of the ESA use the term ''territorial sea'' to denote U.S. territorial sovereignty in contrast to the ''high seas.'' These terms in the ESA appear in the original law, Pub. L. 93–205 (1973), before the establishment of the EEZ. Consequently ''territorial sea'' is used in the ESA in the international sense and would be defined by this rule as extending 12 miles from the baseline. This proposed definition is consistent with the findings, purposes and policies of the ESA, including that of utilizing all Federal authorities to meet the commitment of United States for the protection of endangered species and threatened species.

In the area outside the territorial sea but within the EEZ, the United States exercises jurisdiction with respect to certain marine resources such as marine mammals (See Section 3(14)(B) of the MMPA and Pub. L. 94–265, Sec. 404(a)). Beyond the EEZ, U.S. jurisdiction is based other factors such as U.S. citizenship or the fact that a vessel is operating as a U.S. flag vessel. Under the proposed rule, NMFS would utilize its full jurisdictional authority to protect right whales.

Classification

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration as follows:

I certify that the attached proposed rule to be issued under 50 CFR part 222, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rule would establish protective measures to reduce human-induced disturbance and the potential for injury or mortality to the Northern Right whale throughout its western North Atlantic range.

If adopted, the proposed rule may have a minor impact on whale-watching activities, perhaps especially in the early spring when right whales, but not other whale species, are likely to be in the area where these activities occur. This change would not be expected to affect most operations off the coast of Massachusetts since State regulations very similar to this proposed rule already are in effect within State waters. Whale-watching operations in other areas of New England, consisting of only a few vessels, may need to delay operations until later in the spring when other species of whales are available for watching if restrictions on approaches to right whales are implemented. The cost of delaying operations for a few weeks, with respect to expected revenues, is not considered significant.

Similarly, if adopted, the proposed rule may have a minor impact on commercial shipping and other vessel activities, perhaps especially in areas where and at times when right whales are know or expected to be present. In those areas and at those times, vessels may need to maintain an extra vigilant lookout and reduce speed in order to avoid approaches to right whales. In most situations, such caution would be appropriate under current law in order to avoid the risk of taking a right whale. Any change in operations and the costs associated with that change that would result from the implementation of the proposed rule is not considered significant when compared to expected revenues. Exceptions are provided for emergency situations and where approaches are authorized.

Because of this certification, a regulatory flexibility analysis was not prepared.

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

This proposed rule contains a new, but minor, collection-of-information requirement subject to the Paperwork Reduction Act. Persons operating vessels and involved in certain other activities may need to contact NMFS, the U.S. Coast Guard or other agencies, usually by VHF radio, to explain that an emergency situation exists or to respond to instructions concerning how to avoid right whales. This proposed rule is being submitted to the Office of Management and Budget (OMB) for review and approval. The average reporting burden is estimated to be 0.25 hrs (15 minutes per call) for each radio contact or similar type of report with an estimate of 30 reported sightings per year. This would equal a total of 7.5 hrs of reporting annually. An increased number of sightings would result in a linear increase in the total hours. Send comments regarding these reporting burden estimates or any other aspect of the collections of information, including suggestions for reducing the burdens, to NMFS and OMB (see ADDRESSES).

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number.

The Assistant Administrator for Fisheries, NOAA, is preparing an environmental assessment (EA) under the National Environmental Policy Act for these proposed regulations and is expected to complete that EA shortly. When the EA is completed a notice will be placed in the Federal Register announcing that it is available.

List of Subjects

50 CFR Part 217

Endangered and threatened species, Exports, Fish, Imports, Marine mammals, Transportation.

50 CFR Part 222

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: August 1, 1996.

C. Karnella,

Acting Program Management Officer, National Marine Fisheries Service.

For the reasons set forth out in the preamble, 50 CFR part 217 and part 222 are proposed to be amended as follows:

PART 217—GENERAL PROVISIONS

1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1531–1544; and 16 U.S.C. 742a *et seq.*; unless otherwise noted.

2. In section 217.12, the definitions of ''Territorial sea'', ''Underway'', and ''Vessel'' are added in alphabetical order to read as follows:

§ 217.12 Definitions.

* * * * *

Territorial sea means the 12-nautical mile (22 km) maritime zone set forth in Presidential Proclamation 5928, dated December 27, 1988 (3 CFR, 1988 Comp., p. 547).

* * * * *

Underway, with respect to a vessel, means that the vessel is not at anchor, or made fast to the shore, or aground.

* * * * *

Vessel includes every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.

* * * * *

PART 222—ENDANGERED FISH OR WILDLIFE

3. The authority citation for part 222 is revised to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*; subpart D also issued under 16 U.S.C. 1361 *et seq.*

Subpart D—Special Prohibitions

4. Section 222.32 is added to subpart D to read as follows:

§ 222.32 Approaching northern right whales.

(a) *Definitions.* As used in this section:

(1) *To approach head-on* means to move directly toward a whale, to move on a path that is within 30 degrees of a line directly toward a whale, or to move on a path that will intercept or is likely to intercept a whale.

(2) *Right whale* means any whale that is a member of the western North Atlantic population of the northern right whale (*Eubalaena glacialis*).

(b) *Prohibitions.* Except as authorized under paragraph (d) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, attempt to commit, to solicit another to commit, or cause to be committed any of the following acts with respect to any right whale:

(1) Operate an aircraft within 1,500 feet (460 m) of a right whale;

(2) Cause a vessel or other object to approach within 500 yards (460 m) of a right whale;

(3) Approach by any means within 500 yards (460 m) of a right whale;

(4) Cause a vessel to approach a right whale head-on from any distance once the right whale is observed or should be observed by the operator of a vessel using due diligence, and once there has been time to alter the heading of the vessel consistent with safe vessel operation procedures;

(5) Cause a vessel to be turned, positioned, or maneuvered in a manner to intercept a right whale; or

(6) Fail to undertake required right whale avoidance measures.

(c) *Right whale avoidance measures.* Right whale avoidance are all actions necessary to avoid any taking of a right whale, as prohibited under Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.* or the ESA; all actions necessary to comply with instructions from NMFS, the U.S. Coast Guard, the U.S. Navy, or a port authority concerning the avoidance of right whales; and, unless inconsistent with these actions, if a person, vessel, aircraft or other object is within 500 yards (460 m) of a right whale, appropriate steps to increase that person or object's distance from the right whale as follows:

(1) *Sudden changes in operation.* Sudden changes in direction or speed, including sudden efforts to stop or reverse direction, sudden changes in engine speed, use of bow thrusters, sudden changes in propeller pitch, or other actions that may disturb or harass a right whale must be avoided unless such action is necessary for safety reasons or, if applicable, is necessary for safe aircraft or vessel operation.

(2) *Consistent speed and direction.* If a person, aircraft, vessel or other object is moving away from a right whale, a constant or approximately constant speed and direction must be maintained.

(3) *Changing speed and direction.* If a person, aircraft, vessel or other object is moving toward a right whale, expeditious efforts must be made to change direction away from the right whale and to reduce speed or to shift the motor of a motor vessel into neutral. Once the person, aircraft, vessel or other object is headed away from the right whale or has stopped or reduced speed to a minimum, efforts must be made to move slowly but deliberately and steadily in a direction away from the right whale.

(4) *Moving away from a northern right whale.* If a person is floating or moving slowly in the water, if a helicopter or other aircraft is hovering or moving very slowly, or if a vessel is underway but stationary or operating at very slow speeds and if that person, aircraft or vessel has been or is being approached by a right whale, efforts must be made to move slowly but deliberately and steadily in a direction away from the right whale.

(5) *Vessels or aircraft restricted in ability to maneuver.* If a vessel is restricted in its ability to maneuver and because of those limitations cannot comply with paragraphs (c)(1) through (c)(4) of this section, and undertakes reasonable efforts to maximize distance from and avoid interactions with the right whale, then aircraft or vessel operations may continue notwithstanding the fact that a northern right whale is within 500 yards (460 m).

(6) *Vessels or aircraft not underway or in operation.* Paragraphs (c)(1) through (c)(5) of this section do not apply to a vessel that is not underway or to an aircraft that is not in operation including a seaplane that is not underway or any aircraft that is on shore or onboard a vessel.

(d) *Exceptions.* The prohibitions specified under paragraph (b) of this section do not apply to:

(1) An activity authorized in a permit issued under subpart C (Endangered Fish or Wildlife Permits) of this part or to an activity specifically authorized by NMFS in an incidental take statement, incidental take permit or similar authorization; or

(2) Emergency situations where compliance with those prohibitions would present a threat to the safety, health or life of a person, would present a significant threat to a vessel or aircraft, or would pose a threat to the safety, health or life of a right whale. A person who claims this type of exception has the burden to prove that the exception is applicable. If possible and if appropriate under the circumstance, a person in an emergency situation should contact by telephone or radio communication NMFS, the U.S. Coast Guard, local port authority, or local law enforcement officials and describe the circumstances surrounding the emergency situation.

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