Dated: June 12, 2007.

Michael K. Buckley,

Deputy Assistant Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 0612242865–7168–01; I.D. 092506A]

RIN 0648–AU90

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

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

ACTION: Final rule.

SUMMARY: NMFS revises regulations implementing the Atlantic Large Whale Take Reduction Plan (ALWTRP) by expanding the Southeast U.S. Restricted Area and modifying regulations pertaining to gillnetting within the Southeast U.S. Restricted Area. NMFS prohibits gillnet fishing or gillnet possession during annual restricted periods associated with the right whale calving season. Limited exemptions to the fishing prohibitions are provided for gillnet fishing for sharks and for Spanish mackerel south of 29°00′ N. lat. An exemption to the possession prohibition is provided for transiting through the area if gear is stowed in accordance with this final rule. This action is required to meet the goals of the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). This action is necessary to protect northern right whales from serious injury or mortality from entanglement in gillnet gear in their calving area in Atlantic Ocean waters off the Southeast U.S.

DATES: This final rule is effective July 25, 2007.

ADDRESSES: Requests for copies of this final rule should be addressed to Chief, Marine Mammal Branch, Attn: Right Whale Gillnet Rule, Protected Resources, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701. Copies of the Environmental Assessment (EA), Final Regulatory Flexibility Analysis (FRFA), and copies of all citations referenced in this final rulemaking may be obtained from the persons listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Laura Engleby, 727–824–5312, Barb Zoodsma, 904–321–2806, or Nancy Young, 727–824–5607.

Electronic Access: Regulations, compliance guides, and background documents for the ALWTRP can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

SUPPLEMENTARY INFORMATION:

Background

NMFS published a proposed rule on November 15, 2006 (71 FR 66482), to permanently prohibit gillnet fishing in portions of the Southeast U.S. to protect right whales from entanglement in gillnet gear during their annual calving season. The proposed rule included prohibitions on gillnet fishing and possession, with some exemptions. A detailed description of the proposed management measures and supporting background information and analysis is included in the proposed rule (71 FR 66482, November 15, 2006).

NMFS would like to highlight that this action removes the definitions of ''Shark gillnetting,'' ''Strikenet or to fish with strikenet gear,'' and ''To strikenet for sharks'' from 50 CFR 229.2. The revised ALWTRP regulations are based on gear characteristics, and NMFS believes the regulations do not need to rely on these definitions.

NMFS requested public comment on the proposed rule and provided a 30 day public comment period. NMFS received requests from the public to extend the comment period, and on January 16, 2007, NMFS published a notice in the **Federal Register** reopening the comment period for an additional 15 days (72 FR 1689). In that notice, NMFS announced that all comments received during the period November 15, 2007, through January 31, 2007, would be considered in this rulemaking. Below, we summarize the public comments received, our responses to those comments, and a change made to the proposed regulations based on the comments.

Comments on the Notice of Proposed Rulemaking and Responses

NMFS received 4,571 comments on the proposed rule from fishery management agencies and commissions of southeastern U.S. states, the Marine Mammal Commission (MMC), environmental organizations, commercial fishing organizations, commercial and recreational fishermen, and interested members of the public. NMFS received these comments in the form of electronic mail, letters, and facsimile. Of those, 4,544 were identical, or slightly modified, form letters expressing support for the proposed rule, and 27 contained substantive comments on specific measures or components of the proposed rule. NMFS did not receive any comments on the removal of strikenet definitions. In the text below, NMFS provides a summary of the comments, recommendations, and issues raised that relate to the measures in this rulemaking, provides responses to them, and identifies changes to the proposed regulations. Comments not relevant to this rulemaking, such as those pertaining to the February 16, 2006, temporary rule; the November 15, 2006, emergency rule; and process-related comments relative to the ALWTRT's Southeast (SE) Subgroup meeting were read and considered but are not being discussed in this document addressing the proposed and final rule.

Comment 1: Several commenters stated that gillnet fishing gear is dangerous to right whale mothers and calves. These commenters urged that the proposed rule be finalized, citing the right whale's extremely low abundance estimates and stating that the loss of even one animal contributes to the risk of extinction. Several of these commenters indicated that the loss of right whales has implications throughout the ecosystem. Others emphasized that it is NMFS' responsibility to protect this species and prevent its extinction.

Response: NMFS agrees that gillnet fishing gear can be dangerous to right whale calves, as demonstrated by the January 22, 2006, right whale calf mortality, which occurred as a result of entanglement in gillnet gear allowed to be used in the Southeast U.S. Restricted Area during the restricted period. NMFS also agrees that estimates of right whale abundance are low, that the loss of one right whale may potentially have implications for the right whale population and its ecosystem (see response to Comment 2), and that NMFS has a responsibility to protect right whales. The purpose of this final rule is to protect right whales from the threat of entanglement in gillnet gear by implementing, with revisions, existing ALWTRP regulations promulgated in 1997 under the MMPA that require the Assistant Administrator for Fisheries (AA) to close the Southeast U.S. Restricted Area to gillnet gear during the annual restricted period unless the AA

revises the restricted period or implements other measures under 50 CFR 229.32(g)(2).

Comment 2: One commenter stated that concerns for the status of the right whale are unwarranted and population figures are not valid based on his calculations of right whale abundance using a variety of variables (e.g., abundance in 1935, sex ratio, calving interval, age at senescence), and requested information upon which NMFS' population estimates were based. The commenter also questioned the role of fishing interactions as one of the causes of the right whale's reduced population.

Response: NMFS relies on the best available scientific information, including peer-reviewed scientific literature, to assess northern right whale abundance, status, and threats in marine mammal Stock Assessment Reports (SAR), required by provisions of the MMPA. The SAR for northern right whales in the North Atlantic is updated annually and reviewed both internally and externally by teams of scientific experts. The 2006 SAR for northern right whales in the North Atlantic (Waring *et al.*, 2007) indicates that the best estimate of minimum population size for the species is 306 individually-recognized whales known to be alive during 2001. Because the data are from identification photographs and genetic samples in all known right whale aggregation areas, and very few new adult whales have been added since the mid–1990s, NMFS believes that these records represent a nearly complete census of the population. Therefore, NMFS does not rely on life history parameters to estimate right whale abundance and disagrees that the population figures quoted in the proposed rule are invalid.

Additional population analyses and modeling exercises have been conducted and published in the peer-reviewed literature (e.g., Caswell *et al.*, 1999; Fujiwara and Caswell, 2001). These studies cite high mortality rates in the 1980s and 1990s and conclude that the population began to decline in the early 1990s. These studies conclude that preventing the death of even one adult female could significantly affect the population's trend. A 2001 evaluation by the International Whaling Commission's (IWC) Scientific Committee (Best *et al.*, 2001) also concluded that the population of northern right whales in the North Atlantic is not likely much greater than 300 individuals.

As a result of the low population size, the lack of observed population growth, and deaths from human activities, NMFS determined in 2000 and each year since that the MMPA-defined ''Potential Biological Removal'' (i.e., the maximum number of individuals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its Optimum Sustainable Population (OSP)) for northern right whales in the North Atlantic is zero. That is, the population cannot sustain any deaths or serious injuries due to human causes for the species to recover. Therefore, NMFS disagrees that concerns for the right whale population size are unwarranted.

With regard to the role of fishing interactions as one of the true causes of the reduced population, NMFS acknowledges that by 1935, the northern right whale population was severely depleted by commercial whaling. However, the second-leading known cause of death in right whales from 1970 to 2005 is entanglement in fishing gear. Consequently, the current right whale recovery plan states that implementation of strategies to reduce the likelihood of entanglement is an action that must be taken to prevent extinction or to prevent the species from declining irreversibly (NMFS, 2005).

In sum, NMFS believes that the status of right whales has not improved since the promulgation of the ALWTRP in 1997 and that implementing this provision of the ALWTRP, with revisions, is warranted and necessary for the protection and conservation of right whales.

Comment 3: One commenter questioned whether the January 22, 2006, right whale mortality was the result of entanglement in gillnet gear. The commenter stated that NMFS initially reported to local media that the preliminary cause of death was ship strike, the immediate cause of death was never determined by the necropsy team, and the more typical causes of death from entanglement (e.g., infection, dehydration, or drowning) were not found in this case. The commenter also stated that the lead necropsy scientist reported that the scars on the whale were healing (i.e., the whale could not have been killed by recent entanglement), and that no gear was retrieved from the animal. The commenter further stated that NMFS falls short of satisfying the evidentiary requirements for implementing 50 CFR 229.32(g)(1).

Response: NMFS disagrees that staff reported to local media the January 22, 2006, right whale calf mortality was the result of ship strike. However, NMFS is aware that, shortly following the necropsy, one media outlet erroneously quoted NMFS as stating the cause of death was a ship strike, and recently, the erroneous report was repeated by a second media outlet. In both instances, NMFS contacted the media outlets to correct the inaccuracy.

NMFS acknowledges that the necropsy team did not determine the immediate cause of death of the right whale calf (e.g., infection, dehydration). Internal organs had autolyzed significantly by the time the animal was necropsied. However, the final necropsy report stated the following with regard to the pre-mortem net entanglement injuries: ''the most parsimonious hypothesis is that these injuries were sufficiently serious to initiate the demise of'' this right whale. Thus, the necropsy report supported NMFS' determination that the right whale calf was seriously injured and ultimately died as a result of entanglement in gillnet gear.

NMFS also acknowledges that healing processes had initiated in the peduncle lesions created by net entanglement. Normal live tissue responds immediately to injuries by initiating the healing process. For example, coagulation (''healing'') stops uncontrolled blood flow and similarly, tissue undergoes changes (''healing'') in an attempt to repair injuries. However, it is important not to confuse the process of ''healing'' (an injury yet to be repaired) with an animal's ability to successfully complete the healing process (reparation). In the case of the right whale calf, the animal's body was in the process of attempting to repair (healing) its wounds; however, it was unsuccessful at repairing its entanglement injuries prior to succumbing to death.

Finally, NMFS also acknowledges that gillnet gear was not found on the dead right whale calf. However, evidence of recent entanglement was clearly documented by the necropsy team. Entanglement-related damage to the animal's peduncle included ''extensive epidermal and dermal indentation and penetration with overall pattern formation of diamond, vee, and straight lines....'' Images of these lesions were presented at an informal orientation workshop conducted for interested participants prior to the formal SE Subgroup meeting. At least one gillnet fisherman present stated that the lesions were very similar to gillnet lesions observed on rays incidentally taken in gillnet during his fishing operations. The damage to the animal that was judged to be the result of entanglement met NMFS' criteria of a serious injury (i.e., an injury likely to result in mortality (50 CFR 216.3)). Therefore,

NMFS disagrees with the commenter that NMFS falls short of evidentiary requirements for implementing 50 CFR 229.32(g)(1) since NMFS has determined, based on best available information and discussions with scientific investigators, that the right whale's entanglement and serious injury by gillnet gear ultimately led to the death of the animal (see also responses to comments 4, 5, and 6).

Comment 4: One commenter stated that the proposed rule does not reflect the fishing industry's belief that illegal fishing gear used in the Southeast U.S. Restricted Area was likely involved in the interaction. The commenter stated that there was no clear evidence that legal gear used in the Southeast U.S. Restricted Area was the primary cause of death of the right whale calf found dead on January 22, 2006. The commenter also stated that NMFS ignored information provided by the fishing industry at the SE Subgroup meeting that an illegal gillnet operation was cited by the U.S. Coast Guard in the same area and time as the whale mortality event.

Response: NMFS Office of Law Enforcement has actively investigated the January 22, 2006, right whale mortality, as well as gillnet fishing operations occurring in the same general time and area. As a matter of enforcement policy, NMFS does not provide information on alleged violations of fishery regulations prior to the issuance of charges or if no charges are filed. However, NMFS affirms that we have actively considered the information presented by the fishing industry regarding potential illegal fishing in developing both the proposed and this final rule and that there is no substantiated evidence indicating that illegal gear was involved in the entanglement of the right whale calf.

The April 2006 SE Subgroup meeting Key Outcomes Document (Ellenberg Associates, Inc., 2006) does reflect that some attendees questioned whether legal or illegal fishing caused the right whale mortality. NMFS learned during the Subgroup meeting that there was some confusion among fishermen as to the legality of 4–7/8 inch (12.4 cm) stretched mesh gillnet being used in the restricted area during the restricted period, and, according to the fishermen, this gear was being used in the area where the whale calf was found. One of the industry statements captured in the Key Outcomes Document under Individual Comments reflects this confusion: ''Industry knows what happened with this calf: Fishermen suspect the entanglement involved 4–7/8 inch stretched mesh gillnet.'' However, fishing 4–7/8 inch (12.4 cm) stretched mesh gillnet was allowed under ALWTRP regulations in the Southeast U.S. Restricted Area during the restricted period.

The actual gear entangling the calf was never recovered and the mesh size of the gillnet gear involved in the entanglement could not be determined. Various mesh sizes were legally used within the area, subject to different restrictions established under the ALWTRP regulations, fishery management plans, and applicable state authorities. Even if the actual gear used was 4–7/8 inch (12.4 cm) stretch mesh, as asserted by industry at the SE Subgroup meeting, that gear type was allowed to be used under ALWTRP regulations.

Scientists conducting right whale aerial surveys during the weeks preceding the discovery of the dead right whale calf documented large numbers of buoys in Federal waters off the mouth of the St. Johns River. On-water scientists studying right whales reported and photographed fishermen hauling back large amounts of gillnet that were attached to the buoys. These observations were reported at the SE Subgroup meeting and included in the meeting's Key Outcomes Document (Ellenberg Associates, Inc. 2006) This fishing effort was in the vicinity of where the calf's carcass was found. It was also in an area that included a high density of right whale sightings, including the right whale calf prior to its death. NMFS asked right whale scientists conducting research in the area to report any activity that they felt might be a threat to right whales. No other fishing activity of concern in NE Florida or SE Georgia at that time was reported to NMFS.

NMFS and its law enforcement partners strive to ensure compliance and detect violations. In this case, a large amount of legal fishing with gillnet gear was occurring in the time and place of the right whale calf's entanglement and death. NMFS has considered and investigated the information presented by the fishing industry at the SE Subgroup meeting. NMFS continues to believe, consistent with its previous determinations under 50 CFR 229.32(g)(1), that the death of the right whale calf was the result of entanglement in gillnet gear allowed to be used in the Southeast U.S. Restricted Area during the restricted period.

Comment 5: One commenter stated that NMFS failed to identify the specific fishery involved in the January 22, 2006, right whale calf mortality event. This commenter stated that there was no evidence the North Carolina whiting gillnet fishery was involved in the alleged entanglement.

Response: The implementing regulations do not require NMFS to identify the specific fishery involved; rather, NMFS must determine that the entanglement was caused by gillnet gear allowed to be used in the Southeast U.S. Restricted Area during the restricted period. See response to Comments 3 and 6 regarding NMFS' determinations that gillnet gear was involved in the entanglement and that the gear was set within the Southeast U.S. Restricted Area, respectively. The restricted period at the time was from November 15 to March 31. The calf was sighted on December 30, 2005, and no linear lesions were evident. However, on January 8, 2006, aerial photographs taken of the calf reveal that the peduncle linear lesions were present. Therefore, the entanglement must have occurred between those two dates and during the restricted period.

Comment 6: One commenter stated there was no scientific evidence that the gear implicated in the January 22, 2006, right whale mortality event was actually set in the Southeast U.S. Restricted Area. This commenter stated that gear could have been from outside the Southeast U.S. Restricted Area and pointed out that entangled whales often travel great distances.

Response: The New England Aquarium's right whale photograph database was consulted to determine the sighting history for the dead calf. On December 30, 2005, the calf and its mother were sighted together off St. Catherines Island, Georgia. The calf did not show evidence of entanglement at the time. On January 8 and 9, 2006, the pair were sighted off the mouth of Nassau Sound, Florida, and Cumberland Sound, Georgia, respectively. At that time, the aerial survey photographs suggested the calf had linear scars, consistent with some type of entanglement event. Both sightings occurred well within the Southeast U.S. Restricted Area (the Georgia and Florida sighting locations were greater than 30 nm (55.6 km) and 70 nm (129.6 km), respectively, from the nearest boundary of the Southeast U.S. Restricted Area). Since mother-calf pairs typically remain on the calving grounds in January and are unlikely to travel very long distances in a short period of time, NMFS believes the calf became entangled in gillnet gear within the Southeast U.S. Restricted Area.

Comment 7: One commenter stated that NMFS did not adequately consider the alternative fishing restrictions proposed by gillnet fishermen at the SE Subgroup meeting that would allow

gillnet fishing for whiting to continue north of 29° N. lat. The commenter then listed the restrictions proposed at the SE Subgroup meeting, and included the following additional fishing restrictions: (1) 600 pound (272.4 kg) weak links, (2) all gear would be hauled back one hour before sunset, and (3) cooperative research. The commenter stated these proposed restrictions were similar to those being proposed in the exemption for the Spanish mackerel fishery, but NMFS disregarded the North Carolina whiting fishermen's proposal. The commenter also stated that, unlike the fishing industry proposal, NMFS fully considered comments from the MMC.

Two other commenters stated that they did not support the alternative fishing restrictions proposed by the commercial fishing industry, stating that the proposed measures do not reduce risk inherent in the gear type and do not address the threat to newborn calves in that area.

Response: NMFS explicitly considered the specific alternative gillnet restrictions proposed by the fishermen at the SE Subgroup meeting. The fishermen's proposal was included in the Key Outcomes Document (Ellenberg Associates, Inc., 2006) and was analyzed in the EA as Alternative 2. However, NMFS determined neither the operational restrictions proposed by the commenter, nor any other operational restrictions, would provide sufficient reduction in the likelihood of gillnet gear interactions with right whales, or reduce the risk of right whale serious injury and mortality in the Southeast U.S. Restricted Area. The proposed restrictions would allow large amounts of net to be in the water for long periods of time (i.e., long soak time) in the core right whale calving area.

NMFS considered the three additional fishing restrictions proposed by the commenter (see comment above). First, it is unknown whether weak links will release very young calves. Second, NMFS acknowledges that hauling back gear prior to sunset would likely result in risk reduction. However, the potential for right whale interactions with gillnets in a substantial and core portion of the right whale calving area would not be eliminated during the calving season because large amounts of net and vertical line with very long soak times would continue to be used in the Southeast U.S. Restricted Area. Third, cooperative research does not in and of itself reduce risk to right whales. Therefore, NMFS has determined that these newly proposed restrictions do not meet the bases in 50 CFR 229.32(g)(2) under which exemptions to a full, permanent closure of the restricted area are allowable.

NMFS disagrees that the whiting gillnet proposal for fishing north of 29° N. lat. is similar to the Spanish mackerel exemption. Right whale distribution patterns south of 29° N. lat. and existing state gillnet prohibitions combine to result in minimal spatial and temporal overlap of right whales and Spanish mackerel fishing effort during the exempted periods. All gillnet fishing, including Spanish mackerel fishing, is prohibited north of 29° N. lat. by this final rule because any gillnet fishing activity in that area during the calving season would result in heavy spatial and temporal overlap with calving right whales. For the minimal amount of time that right whales and Spanish mackerel fishing effort do overlap south of 29° N. lat., the fishing gear characteristics and operational methods reduce risk to right whales: nets greater than 800 yards (2,400 ft, 732 m) are prohibited and soak time must be less than one hour. The whiting fishermen proposal would allow nets up to 2,800 yards (8,400 ft, 2.56 km) in length (2,000 more yards (6,000 ft, 1.83 km) of net and associated vertical lines than allowed by the Spanish mackerel exemption) and soak times of 4–6 hours (Ellenberg Associates, Inc. 2006).

NMFS considered comments submitted by the MMC. Title II of the MMPA charges the MMC with recommending to Federal officials steps the MMC deems necessary or desirable for the protection and conservation of marine mammals. The MMPA charges Federal officials with responding to the MMC regarding their recommendations. As such, NMFS is required to consider MMC recommendations. As part of this rulemaking, NMFS has considered the MMC recommendations, similar to other recommendations, relative to 50 CFR 229.32(g)(1) and (2).

Comment 8: One commenter stated that the actions contained in the proposed rule are beyond the scope of the authority of the NMFS Southeast Regional Office (SERO).

Response: The regulations at 50 CFR 229.32(g)(1) state that the AA must take specific action when a serious injury or mortality of a right whale occurs in the Southeast U.S. Restricted Area from November 15 through March 31 as a result of entanglement by gillnet gear allowed to be used in that area and time. NMFS is required to close that area to that gear type for the rest of that time period and for that same time period in each subsequent year, unless the AA revises the restricted period or unless other measures are implemented in accordance with 50 CFR 229.32(g)(2). The January 22, 2006, right whale calf mortality occurred as a result of entanglement in gillnet gear allowed to be used in the Southeast U.S. Restricted Area during the restricted period (see responses to Comments 3, 4, 5, and 6). Consequently, the AA determined to take action through this final rule to prevent additional serious injury or mortalities of right whales. Thus, NMFS has appropriately implemented its authority.

Comment 9: One commenter stated that the provisions required for the exemption of gillnetting for sharks and for Spanish mackerel south of 29° N. lat., including restrictions on setting nets within 3 nm (5.6 km) of right whales and other large whales and requiring the removal of nets from the water if a whale approaches within 3 nm (5.6 km), may be difficult to put into practice and impossible to enforce, given that the exemptions occur in areas for which there are no dedicated marine mammal surveys and the likelihood that fishermen would receive notification of whales in the area would be small. The commenter suggests continued research on methodology, such as passive acoustic monitoring, for determining that no whales are in the vicinity of nets in the water.

Response: NMFS acknowledges these provisions may be challenging to enforce, but we believe other requirements for the exempted fisheries will allow fishermen to detect and avoid close interactions with large whale species. For example, fishermen gillnetting for sharks in the restricted area are required to use a spotter plane (50 CFR 229.32(f)(4)(iv)), so whales in the area will likely be seen and fishermen will be capable of removing gear from the water. The Spanish mackerel fishery has existing gear requirements at 50 CFR 622.41(c)(3)(ii), including short soak time, limit of one net fished, set, or placed in the water at any one time, and restrictions on float line length, as well as new requirements prohibiting the setting of gear at night or in low visibility and removing gear from the water before night or if visibility decreases below 500 yards (1,500 ft, 460 m). NMFS believes these factors, in conjunction with known and predicted right whale distribution patterns in the Southeast U.S. Restricted Area south of 29° N. lat. during December through March, and existing Florida regulations prohibiting gillnetting in state waters that further reduce the potential spatial overlap between gillnet fishing and right whales, are operationally effective and will protect right whales from the risk of serious injury and mortality.

NMFS agrees that methods such as passive acoustic monitoring may be useful for managing human interactions with whales. However, at this time it is unknown if mother/calf pairs vocalize while in the Southeast U.S. calving area. Research in this area is underway. For example, hydrophone arrays were deployed during the 2006–2007 calving season in the vicinity of the St. Mary's and Brunswick River entrances. Researchers will soon begin examining the findings and comparing them to aerial survey sightings to determine the efficacy of this technology in reliably detecting the presence of whales, including mother/calf pairs, in the Southeast U.S. calving area.

Comment 10: NMFS received several comments regarding the economic impact of the proposed rule. One commenter stated that the proposed regulations disproportionately impact North Carolina gillnetters targeting whiting and stated that these fishermen are not being provided with a safe, viable economic alternative to continue fishing for whiting in the region. Other commenters stated that while the rule may impose a burden on some gillnetters, economic interests should not supersede necessary species protection, and fishing operations must be restricted to reduce entanglement risk to endangered right whales.

Response: As required by the Regulatory Flexibility Act (RFA), NMFS conducted an analysis of the socio-economic impacts of these regulations, which can be found in the EA and regulatory flexibility analysis. NMFS agrees that this final rule is expected to most greatly affect fishermen who fish for whiting in the Southeast U.S. Restricted Area North. NMFS notes, however, that all gillnet fishing will be prohibited by this final rule in the Southeast U.S. Restricted Area North, not just whiting fishing. In addition, comments made by whiting fishermen at the SE Subgroup meeting suggest these losses could be mitigated by moving into other areas and/or targeting other species at other times of the year, resulting in minimal long-term impacts for these fishermen from this final rule. Finally, at the SE Subgroup meeting, NMFS inquired about the feasibility of fishing for whiting in other areas, such as the Southeast U.S. Restricted Area South, but fishermen reported that a unique habitat feature off northeast Florida resulted in a very localized concentration of whiting and this is where whiting gillnet fishing effort was necessarily focused.

This final rule implements regulations at 50 CFR 229.32(g)(1), with associated revisions to 50 CFR 229.32(f). Consequently, anything less than a full and permanent closure of the Southeast U.S. Restricted Area to all gillnet fishing during the restricted period can only be authorized based on the considerations in 50 CFR 229.32(g)(2). This final rule eliminates the potential for right whale interactions with gillnets in the Southeast U.S. Restricted Area North, a substantial and core portion of the right whale calving area. However, this final rule does allow for gillnet fishing exemptions in the Southeast U.S. Restricted Area South. NMFS has determined that a combination of existing and new regulatory requirements for exempted fisheries in this area and during the restricted period are both operationally effective and capable of protecting right whales from the risk of serious injury and mortality pursuant to 50 CFR 229.32(g)(2)(i) (see also response to Comment 7).

Comment 11: One commenter stated that there is no evidence that low-rise North Carolina-style whiting gear or associated vertical lines presents a serious threat to right whales in the Southeast U.S. Restricted Area.

Response: Although the exact mechanism by which right whales become entangled in gillnet gear is unknown, NMFS has documented entanglements of right whales in gillnets and vertical lines. Therefore, NMFS cannot verify that gillnets fished in a low-rise fashion (i.e., sink gillnet) are less risky than other gillnets or gear with vertical lines in the core calving area. Therefore, fishing with low-rise gillnets in the Southeast U.S. Restricted Area North does not meet the bases in 50 CFR 229.32(g)(2) under which exemptions to a full, permanent closure of the restricted area are allowable.

Comment 12: Comments were received regarding the proposed changes to the boundaries of the Southeast U.S. Restricted Area. Several commenters supported expanding the restricted area to include waters off South Carolina, and several other commenters requested further expansion. Two commenters supported a boundary of 40 nm (74.08 km) off the coast of South Carolina, with one commenter citing habitat analysis research that indicates potential right whale habitat extends in excess of 35 nm (64.82 km) from the South Carolina shoreline. Two other commenters advocated expanding the entire Southeast U.S. Restricted Area to 200 nm (370.4 km) (the outer limit of the U.S. Exclusive Economic Zone (EEZ)), with one commenter citing low survey effort in offshore waters and uncertainty about use of these waters by whales, and reasoning that extending the geographical boundary would have no significant economic impact and would prevent development of new fisheries in that area.

Another commenter opposed the expansion of the restricted area, stating that the expansion is not based on credible science. The commenter stated that NMFS based its decision on aerial surveys conducted from 2001–2005, with no entanglements or strandings to indicate there is a problem in this area, a single observation of a right whale mother/calf pair in the 2004–2005 calving season, and a single year of acoustic monitoring. The commenter requested that more substantial and robust scientific evidence justifying the expansion be presented.

Response: The decision to expand the Southeast U.S. Restricted Area to include waters off South Carolina is based on several factors, which are described in the proposed rule (71 FR 66482, November 15, 2006) and EA. These factors include aerial and acoustic monitoring data that show the consistent occurrence of right whales in waters off South Carolina throughout the winter months (McLellan *et al.*, 2001; Glass *et al.*, 2005; Clark 2006).

During relatively limited aerial survey effort from 2001–2005, NMFS contractors documented numerous sightings of right whales off South Carolina during the calving season. NMFS consulted aerial survey data collected off South Carolina during the 2005/2006 and 2006/2007 calving season to determine if right whales were continuing to use that area. At least 25 sightings of one or more right whales, including mother/calf pairs, were observed off South Carolina during each of those calving seasons (Glass and Taylor 2006; and Wildlife Trust, unpub. data). One mother/calf pair was observed off South Carolina multiple times but was not observed during that calving season in any other survey area. Thus, the best available information indicates South Carolina is used exclusively as a calving area by some right whales.

NMFS also relied on habitat models that demonstrate a strong relationship between the spatial distribution of calving right whales and specific environmental variables (i.e., water temperature and bathymetry). Environmental conditions strongly correlated with calving right whale distribution are typically found off South Carolina to distances of 35 nm (64.82 km) from shore during winter months. Thus, NMFS is expanding the Southeast U.S. Restricted Area to include waters 35 nm (64.82 km) off the

coast of South Carolina to adequately protect right whales from the threat of entanglement in fishing gear during the calving season.

NMFS specifically solicited public comment on the decision to place the boundary at 35 nm (64.82 km) rather than 40 nm (74.08) off the coast of South Carolina. Although NMFS considered various factors, including Hain and Kenney's (2005) conclusion that uncertainty in predicting right whale occurrence is increased with distance from shoreline due to reduced search effort, we believe that scientific evidence does not support a 40 nm (74.08 km) boundary. Recent predictive modeling efforts show that the expected seasonal progression of temperature off South Carolina is such that the optimal water temperature/bathymetry correlates preferred by right whales, and peak predicted sighting rates, for calving right whales occurs throughout much of the spatial range in waters typically out to 50 km (27 nm) from shore (Garrison, 2007). However, habitat in the marine environment is best represented as a spatial gradient between the most suitable and least suitable environments, and there is no clear spatial boundary for the habitat and no boundary to the movement of right whales inside and outside of the optimal habitat. However, as habitat modeling in Garrison 2007 demonstrates, the water temperature bathymetry correlates preferred by calving right whales degrade from the optimal values of these variables with increasing distance from shore. Mean right whale calving density as a function of distance from shore predicted by the model is nearly zero at 35 nm (64.82 km) from shore. Therefore, NMFS has determined that a 35–nm (64.82–km) boundary provides a sufficient buffer from the 27–nm (50–km) distance predicted by the habitat model. NMFS is therefore maintaining the 35–nm (64.82–km) management boundary for waters off South Carolina.

NMFS is not expanding the seaward boundary of the restricted area to the edge of the EEZ. This final rule is specific to right whale protection from gillnet fishing activity in critical calving area. While right whale survey effort is low east of 80° W. long., the Gulf Stream apparently serves as a thermal boundary to the eastward movements of right whales in the Southeast U.S. (Keller *et al.*, 2006).

Comment 13: NMFS received several comments regarding the proposed changes to the restricted period. Two commenters recommended that the restricted period for the Southeast U.S. Restricted Area North be extended to November 1 through April 30 instead of the current period of November 15 to March 31 to adequately protect right whale mothers and calves in the calving area. One of these commenters stated that migration patterns of right whales are not well known, and appropriate closure periods will be determined more reliably as more is learned; however, the whales must occur in the northern area both earlier and later in the season than in the southern area, for the southward and northward migration. Another commenter proposed alternate dates for the restricted period for the right whale critical habitat area. This commenter requested that April 1 remain the ending date for the restricted period. More specifically, the commenter asked that the area south of the Georgia/Florida border open for the whiting fishery on April 1, and the area between the North Carolina/South Carolina border and the Georgia/Florida border remain closed through April 15, on the basis that this would allow right whales to exit the area on their northward migration route, and allow fishermen to salvage a two week fishing season (during the first portion of April) while water temperatures are favorable for a viable fishery.

Response: The ALWTRP regulations at 50 CFR 229.32(g)(2)(v) authorize the AA to revise the restricted period if NMFS determines that right whales are remaining longer than expected in a closed area or have left earlier than expected. In developing this final rule, NMFS considered whether right whales were remaining longer in or leaving earlier from the Southeast U.S. Restricted Area than previously expected, recognizing that a substantial amount of aerial survey data and opportunistic sightings of right whales have been collected since the ALWTRP regulations were originally promulgated in 1997. The November 15 through March 31 timeframe was established as the restricted period for the entire Southeast U.S. Restricted Area in the original ALWTRP regulations. More recent data indicate that right whales are rarely sighted south of 29° N. lat. in November or in April; however, right whales have been sighted throughout the area north of 29° N. lat. and extending north to the South Carolina/North Carolina border from mid-November through mid-April. Consequently, in accordance with 50 CFR 229.32(g)(2)(v), NMFS has determined that it is appropriate to modify the annual restricted period to include two restricted periods specific to the northern and southern zones of the Southeast U.S. Restricted Area: November 15 through April 15 north of 29° N. lat. and December 1 through March 31 south of 29° N. lat. This is consistent with NMFS' June 21, 2005, proposed rule to amend the ALWTRP(70 FR 35894). NMFS believes the dates are sufficiently protective of right whale mothers and calves during their southward and northward migration.

NMFS specifically re-evaluated available information in consideration of the alternate restricted period proposed by one commenter and described above, for the area south of the Georgia/Florida border. This information included habitat models and right whale sightings data from aerial surveys geographically stratified as north and south of the Georgia/Florida border. Habitat models predict right whales to be present south of the Georgia/Florida state boundary and as far south as Cape Canaveral through the end of March (Garrison 2007), indicating that whales would be migrating through the Southeast U.S. Restricted Area North during the first two weeks of April. This is confirmed by right whale sighting data from aerial surveys. NMFS reviewed effort-corrected right whale sighting records contained in the University of Rhode Island database for the area between 29° N. lat. and the Georgia/Florida border (30° 42.5′ N. lat.) for right whale sightings from April 1 to April 15. The mean number of sightings per unit of survey effort is zero for the area south of the Georgia/Florida border in the second half of April, but greater than zero during the first half of April, indicating that right whales are present in that area through mid-April. NMFS believes that allowing gillnet fishing in the area south of the Georgia/Florida border annually after March 31 would pose an unacceptable risk to right whales.

Comment 14: Comments were received requesting additional exemptions to the prohibition on gillnet fishing and possession during the restricted period. These exemptions include beach-based recreational gillnetting in South Carolina, scientific research using gillnets, and traversing through Little River Inlet with fish on board. One commenter stated that any additional exemptions should be minimized and granted only in areas where such activities will not take right whales. Others opposed any additional exemptions. Finally, some commenters not only opposed additional exemptions but supported increased restrictions of gillnets and other fishing gear types.

Response: NMFS reiterates that this final rule implements and amends the

ALWTRP regulations under the MMPA and the ESA and applies only to certain commercial fisheries that interact with large whales. This final rule does not apply to recreational fishing or non-commercial fishing for scientific research if no sale or barter is involved. While NMFS has the statutory authority to issue protective regulations for right whale impacts caused by activities other than commercial fisheries, that is beyond the scope of this action which was triggered by existing regulatory requirements in 50 CFR 229.32(g)(1).

Recreational and research gillnetting are not exempt from the take prohibitions under either the ESA or MMPA, and would need applicable authorizations if right whale takes were anticipated. South Carolina Department of Natural Resources permits a licensed recreational surf gillnet fishery that currently includes 212 participants operating mainly along the state's northern coast, and states they believe the characteristics of the fishery make the likelihood of interaction with large whales extremely low. Nets are restricted to no longer than 100 feet (30.48 m) and are used in unrestricted areas of the Atlantic Ocean, typically in water depths less than 8 feet (2.44 m). Fishermen are required to remain within 500 feet (152.4 m) or ''hailing distance'' of their nets at all times. Given the bathymetry off South Carolina's Atlantic beaches, gillnet gear is unlikely to extend into depths where right whales would normally occur.

NMFS continually works with state fishery management agencies in the southeast U.S. to develop conditions for research permits for the safe conduct of research activities that avoid potential impacts to right whales. These conditions may include limits on net length, number of nets, soak time, tending requirements, observer requirements, disentanglement training, breakaway panels, and endline modifications. To date, fishing effort has been very low for scientific research gillnetting.

NMFS agrees that it is reasonable to allow gillnet vessels to transit in and out of the Little River Inlet and is modifying the restricted area accordingly in this final rule. NMFS has moved the boundary of the restricted area southward to exclude the Little River Inlet from the Southeast U.S. Restricted Area. This modification will allow fishermen who participate in a legal commercial gillnet fishery off the southeastern coast of North Carolina to transit through Little River Inlet on the South Carolina/North Carolina border with gillnets and fish onboard. This measure alleviates safety concerns associated with fishermen in small vessels (typically less than 24 feet (7.3 m)) being required to use the closest navigable inlet beyond the restricted area, Shallotte Inlet, which is approximately 10 nm (18.52 km) away and can become unsafe in certain weather conditions. The modification poses no additional risk to right whales because the change in area is very small and gillnetting will remain prohibited in South Carolina state waters surrounding the inlet.

Comment 15: Several commenters stated they support the gillnet closure in the Southeast U.S., but believe that additional measures should be taken to protect right whales in other areas, including the North Pacific Ocean, Stellwagen Bank National Marine Sanctuary, other National Marine Sanctuaries, and Cape Cod Bay. Comments were also received requesting protections for right whales in areas outside of U.S. jurisdiction.

Response: The purpose of this final rule is to implement existing ALWTRP regulations at 50 CFR 229.32(g)(1) and (2), with associated revisions to 50 CFR 229.32(f), in response to the January 22, 2006, right whale calf mortality. The regulations only cover the Southeast U.S. calving area; therefore, measures addressing other geographical areas are outside the scope of this rulemaking.

Summary of Changes in This Final Rule Relative to the Proposed Rule

Based on comments received, NMFS has changed the final rule from the proposed rule to exclude the Little River entrance, South Carolina, from the expanded Southeast U.S. Restricted Area. Coordinates contained in the table in 50 CFR 229.32(f)(1)(i) have been revised to reflect this change. Figure 1 illustrates the Southeast U.S. Restricted Area as modified by this final rule. Furthermore, paragraph 229.32(f)(3) that addresses observer requirements in the Southeast U.S. Observer Area, is modified to eliminate references to observer requirements for the Southeast U.S. Restricted Area North. Since this final rule eliminates gillnetting in the Southeast U.S. Restricted Area North, modifying this paragraph as specified will avoid confusion.

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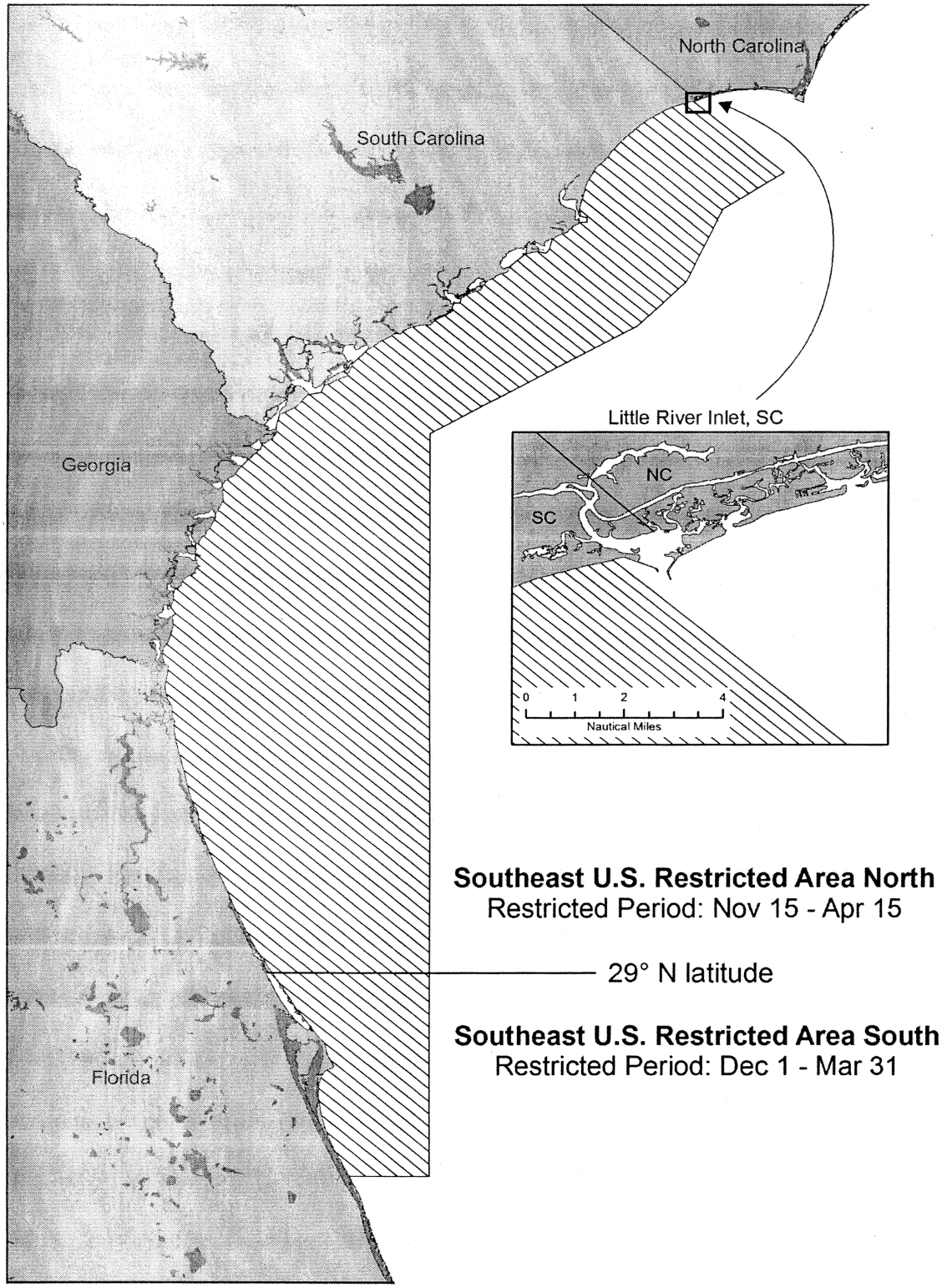

Figure 1. Revised Southeast U.S. Restricted Areas and Restricted Periods.

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Classification

In accordance with section 118(f)(9) of the MMPA, NMFS has determined that this action is necessary to implement take reduction measures to protect northern right whales in the North Atlantic. In addition, pursuant to section 11(f) of the ESA, NMFS is promulgating these regulations to enforce the ESA's prohibitions on the taking of endangered right whales.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an EA for this action, and the AA concluded that there will be no significant impact on the human environment as a result of this final rule. A copy of the EA is available from NMFS (see **ADDRESSES**).

A final regulatory flexibility analysis (FRFA) incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS responses to those comments, and a summary of the analyses completed to support the action. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

In summary, the purpose for this final rule is to implement the requirements of § 229.32(g)(1) and to reduce serious injury and mortality to northern right whales in the North Atlantic incidental to commercial gillnet fishing in the Southeast U.S. Atlantic Ocean, in response to the death of a right whale calf in January 2006. The implemented ALWTRP provisions as amended include expanding the Southeast U.S. Restricted Area and prohibiting gillnet fishing and possession within that area, with certain exemptions. The MMPA and the ESA provide the statutory bases for this final rule.

Commercial fishing vessels that operate in the expanded Southeast U.S. Restricted Area from November 15 through April 15 (waters off South Carolina, Georgia, and northeast Florida) and use gillnets are expected to be affected by this final rule. This final rule is expected to have greatest impact on gillnet fishermen targeting whiting, shark, and Spanish mackerel. Six to eight shark gillnet fishing vessels and up to 56 finfish gillnet fishing vessels are expected to be affected by this final rule. The Small Business Administration defines a small entity in the commercial fishing sector as a firm that is independently owned and operated, is not dominant in its field of operation, and has average annual gross receipts not in excess of $4 million (2002 NAICS 114111). It is assumed that all of the affected vessels represent small businesses. All of the vessels that are engaged in shark and finfish gillnet fishing in the expanded Southeast U.S. Restricted Area are small businesses. This final rule is expected to affect all of those businesses. Consequently, it is expected to affect a substantial number of small businesses.

Two comments were received pertaining to the IRFA or economic impacts specific to small entities resulting from the management actions presented in the proposed rule. A more expanded response to these comments is found above in the ''Comments on the Notice of Proposed Rulemaking and Responses'' section.

One commenter stated that the proposed regulations would disproportionately impact NC gillnetters targeting whiting, and stated that while other commercial fisheries have received limited exemptions, NC gillnet fishermen have no safe, viable economic alternative to continue fishing for whiting in the region. The Initial Regulatory Flexibility Analysis (IRFA) that NMFS prepared for the proposed rule analyzes the impacts to these fishermen. Based on this analysis, NMFS agrees that this final rule is expected to most greatly affect fishermen that fish for whiting in the Southeast U.S. Restricted Area North. NMFS notes, however, that all gillnet fishing will be prohibited by this final rule in the Southeast U.S. Restricted Area North, not just whiting fishing. In addition, comments made by whiting fishermen at the SE Subgroup meeting suggest these losses could be mitigated by moving into other areas, or targeting other species at other times of the year, or both, resulting in minimal long-term impacts for these fishermen from the final rule. Finally, at the SE Subgroup meeting, NMFS inquired about the feasibility of fishing for whiting in other areas, such as the Southeast U.S. Restricted Area South, but fishermen reported that a unique habitat feature off northeast Florida resulted in a very localized concentration of whiting and this is where whiting gillnet fishing effort was necessarily focused. No changes were made to this final rule relative to this comment.

Several commenters expressed concern regarding safety and fuel costs for fishermen that work out of Little River Inlet and fish off North Carolina. NMFS has removed this burden by moving the boundary of the restricted area southward to exclude the Little River Inlet from the Southeast U.S. Restricted Area. As discussed in the preamble of this final rule, NMFS has modified the expanded Southeast U.S. Restricted Area to exclude the Little

River Inlet. The estimated economic impacts in the IRFA are not expected to change, as affecting legal gillnet fishing off North Carolina was an unintentional and unknown effect of the proposed rule.

This final rule prohibits gillnet fishing in the northern zone of the expanded restricted area, during the restricted period, without exemptions. This final action is expected to reduce average annual shark gillnet revenue in the northern zone by $4,029. Total shark gillnet landings in Florida north of 29° N. lat. from November 1 through April 30 varied from zero to 38,229 lbs (17,340 kg) during the years from 2000 through 2004, with an annual average of 12,768 lbs (5,804 kg) and a dockside value of $7,712. These averages represent an over-estimation of losses from reduced shark gillnet landings in Florida from the northern zone because the restricted period is actually from November 15 through April 15, not November 1 through April 30. If November landings during the restricted period represent 50 percent of all November landings, and if April landings during the restricted period represent 50 percent of all April landings, this final rule is expected to reduce total shark gillnet landings in Florida from the northern zone by $3,856 and 6,384 lbs (2,902 kg). This final rule is expected to reduce average annual shark gillnet landings by 6,636 lbs (3,016 kg) and average annual shark gillnet revenue in the northern zone (South Carolina and Florida combined) by $4,029 ($3,856 from Florida plus $173 from South Carolina), assuming not all November and April landings occur in the restricted period.

This final rule prohibits gillnet fishing during the restricted period in a southern zone of the expanded restricted area with certain limited exemptions for shark and Spanish mackerel gillnet fishing. The southern zone is composed of Trip Ticket area 732, which lies entirely in waters off Florida. This final rule is expected to have no effect on shark gillnet revenues in the southern zone because current shark gillnet requirements in the southern zone are the same as the requirements for the exemptions in this final action.

The average annual shark gillnet revenue expected to be lost as a result of this final rule is $4,029 ($4,029 from the northern zone plus $0 from the southern zone), which represents about 2 percent of annual shark gillnet revenues from the combined zones. As six to eight shark gillnet fishing vessels are expected to be affected by this final rule, each shark gillnet fishing vessel is expected to lose on average from $504 to $672 annually from lost shark landings.

It is estimated that Spanish mackerel gillnet fishermen in the northern zone may lose on average 1,509 lbs (686 kg) of Spanish mackerel with an average dockside value of $1,159 annually. During the 6–month period from November 1 through April 30 from 2000 through 2004, an average of 102 lbs (46 kg) of Spanish mackerel with a dockside value of $86 were landed from gillnets and caught in the northern zone. In the first four months of 2005, however, 1,509 lbs (686 kg) with a dockside value of $1,159 were landed from gillnets. It is possible that, since 2005, Spanish mackerel fishers are increasingly targeting the species in the northern zone during these 5 months. Consequently, November through December 2004 and January through April 2005 landings of Spanish mackerel were used to estimate losses of gillnet landings to Spanish mackerel fishers in the northern zone, although this method may significantly over-estimate losses to Spanish mackerel gillnet fishers who operate in the northern zone. These northern zone landings represent less than half a percent of annual Spanish mackerel landings in the Southeast U.S. Restricted Area.

Annual losses to Spanish mackerel gillnet fishers in the southern zone are expected to be $2,928 on average. Spanish mackerel gillnet fishers will not be able to take the species in the southern zone during the months of January and February. From 2000 through 2004, landings during these 2 months averaged 5,442 lbs (2,474 kg), with a dockside value of $2,928, annually. This analysis assumes Spanish mackerel gillnet fishers will not experience any losses of landings during the other months of the restricted period because exemptions to this final rule are consistent with existing Spanish mackerel gillnet operations during these other months. Consequently, annual losses to Spanish mackerel gillnet fishers in the southern zone are expected to be $2,928 (5,442 lbs; 2,474 kg). These southern zone landings represent about 1.5 percent of annual Spanish mackerel gillnet landings in the Southeast U.S. Restricted Area.

The combined loss of landings from the northern and southern zones of Spanish mackerel are expected to be 6,951 lbs (3,160 kg; $4,087). This combined loss represents approximately 2 percent of pounds annually landed in the Southeast U.S. Restricted Area.

Average annual losses of king whiting from the northern zone are expected to be 356,604 lbs (162,093 kg) with a dockside value of $276,824. Average annual landings of king whiting during the 5–month period between November through April from 2000 through 2004 vary significantly from landings during the first 4 months of 2005. Consequently, November and December 2004 figures and the January through April 2005 figures are used to estimate average annual losses of gillnet landings of king whiting from the northern zone. If all November and April landings occur within the restricted period, average annual losses of king whiting landings in the northern zone are expected to be 419,418 lbs (190,245 kg) with a value of $327,053. However, if November and April landings are evenly distributed throughout those months, estimated loss of landings during the restricted period are expected to represent 50 percent of November and April landings, respectively (since the restricted period begins November 15 and ends April 15), average annual losses of king whiting from the northern zone are expected to be 356,604 lbs (162,093 kg) with a dockside value of $276,824.

Average annual losses of king whiting landings from the southern zone are expected to be 4,255 lbs (1,934 kg) with a dockside value of $4,318. During the above 4–month period from 2000 through 2004, an average of 4,255 lbs (1,934 kg) of king whiting were landed in the southern zone with a dockside value of $4,318, annually. Figures from January 1 through March 31, 2005, do not suggest that king whiting gillnet fishers are increasingly targeting the species in the southern zone.

The combined loss of king whiting landings from the northern and southern zones are expected to be 360,859 lbs (164,027 kg; $281,142). The combined loss represents at least 70 percent of pounds landed annually in the Southeast U.S. Restricted Area.

Three other alternative operational measures were considered in this rulemaking. Alternative 1, a no-action alternative, was rejected because it would not address the risk of serious injury or mortality posed by commercial gillnet fishing to right whales in their calving area evidenced by the 2006 death of a right whale calf.

Alternative 2 would implement permanent limited operational restrictions in the expanded Southeast U.S. Restricted Area during the current restricted period of November 15 through March 31, annually. Enacting operational restrictions, as detailed in section 2.2.2 of the EA, would provide a reduction in the likelihood of gillnet gear interactions with endangered right

whales, reducing the risk of serious injury and mortality. This alternative would also result in a reduction in the risk of injury or mortality to other species that may become incidentally entangled in gillnet gear. However, the restrictions would only reduce and not eliminate the threat of serious injury and mortality of right whales from interacting with gillnet gear.

Alternative 3 would implement the immediate closure of the expanded Southeast U.S. Restricted Area to all gillnets from November 15 through March 31 annually on a permanent basis. No exemptions would be provided during the closure. Losses of gillnet landings caused by Alternative 3 would be equal to losses of gillnet landings caused by Alternative 2 plus losses of king whiting gillnet landings. Alternative 2 would be expected to reduce gillnet dockside revenues by $84,506 ($16,944, $50,447, $642, $4,742, and $11,731 from reduced landings of shark, Spanish mackerel, King mackerel, Bluefish, and ''Other Species'', respectively). Average annual losses to king whiting fishers caused by Alternative 3 were expected to be 348,301 lbs (158,319 kg), with dockside revenues of $271,696. Combined, Alternative 3 would be expected to result in losses of dockside revenue of $356,202. This alternative had the greatest economic impact of all alternatives, and was therefore not selected.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. A small entity compliance guide was prepared as part of this rulemaking process. The guide will be sent to all registered gillnet fishers in the Marine Mammal Authorization Program in South Atlantic states. Guides will also be provided to state resource management agencies, the USCG, and others as appropriate for distribution to the fishing industry. In addition, copies of this final rule and guide are available from NMFS and on the ALWTRP website (see **ADDRESSES**).

This final rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act (PRA). Any information collection requirements subject to PRA and related to VMS or observer requirements were addressed in previous rulemakings.

This final rule does not duplicate, overlap, or conflict with other Federal rules. NMFS is presently finalizing a proposed rule that addresses broad modifications to the ALWTRP (70 FR 35894). When finalized, that rule will incorporate modifications to the ALWTRP that result from this final rule on gillnet fishing in the Southeast U.S.

List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: June 19, 2007.

Samuel D. Rauch III,

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

■ For reasons set out in the preamble, 50 CFR part 229 is amended as follows:

PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

■ 1. The authority citation for part 229 is revised to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*; § 229.32(f) also issued under 16 U.S.C. 1531 *et seq.*

■ 2. In § 229.2, the definitions of ''*Shark gillnetting,*'' ''*Strikenet or to fish with strikenet gear,*'' and ''*To strikenet for sharks*'' are removed.

■ 3. In § 229.32, paragraphs (f)(1)(i), (f)(3), (f)(4), and (g)(1) are revised to read as follows:

§ 229.32 Atlantic large whale take reduction plan regulations.

* * * * *

(f) * * *

(1) * * *

(i) *Southeast U.S. Restricted Area.* The Southeast U.S. Restricted Area consists of the area bounded by straight lines connecting the following points in the order stated from south to north, unless the Assistant Administrator changes that area in accordance with paragraph (g) of this section:

Point	N. Lat.	W. Long.
SERA1	27°51′	([1])
SERA2	27°51′	80°00′
SERA3	32°00′	80°00′
SERA4	32°36′	78°52′
SERA5	32°51′	78°36′
SERA6	33°15′	78°24′
SERA7	33°27′	78°04′
SERA8	([2])	78°33.9′

[1]Florida shoreline.

[2]South Carolina shoreline.

(A) *Southeast U.S. Restricted Area N.* The Southeast U.S. Restricted Area N consists of the Southeast U.S. Restricted Area from 29°00′ N. lat. northward.

(B) *Southeast U.S. Restricted Area S.* The Southeast U.S. Restricted Area S consists of the Southeast U.S. Restricted Area southward of 29°00′ N. lat.

* * * * *

(3) *Observer requirement.* No person may fish for shark with gillnet with webbing of 5 inches (12.7 cm) or greater stretched mesh in the southeast U.S. observer area from December 1 through March 31 south of 29°00′ N. lat. unless the operator of the vessel calls the Southeast Fisheries Science Center Panama City Laboratory in Panama City, FL, not less than 48 hours prior to departing on any fishing trip in order to arrange for observer coverage. If the Panama City Laboratory requests that an observer be taken on board a vessel during a fishing trip at any time from December 1 through March 31 south of 29°00′ N. lat., no person may fish with such gillnet aboard that vessel in the southeast U.S. observer area unless an observer is on board that vessel during the trip.

(4) *Restricted periods, closure, and exemptions.*

(i) *Restricted periods.* The restricted period for the Southeast U.S. Restricted Area N is from November 15 through April 15, and the restricted period for the Southeast U.S. Restricted Area S is from December 1 through March 31, unless the Assistant Administrator revises the restricted period in accordance with paragraph (g) of this section.

(ii) *Closure for gillnets.*

(A) Except as provided under paragraph (f)(4)(v) of this section, fishing with or possessing gillnet in the Southeast U.S. Restricted Area N during the restricted period is prohibited.

(B) Except as provided under paragraph (f)(4)(iii) of this section and (f)(4)(iv) of this section, fishing with gillnet in the Southeast U.S. Restricted Area S during the restricted period is prohibited.

(iii) *Exemption for Southeastern U.S. Atlantic shark gillnet fishery.* Fishing with gillnet for sharks with webbing of 5 inches (12.7 cm) or greater stretched mesh is exempt from the restrictions under paragraph (f)(4)(ii)(B) if:

(A) The gillnet is deployed so that it encloses an area of water;

(B) A valid commercial directed shark limited access permit has been issued to the vessel in accordance with 50 CFR § 635.4(e) and is on board;

(C) No net is set at night or when visibility is less than 500 yards (1,500 ft, 460 m);

(D) The gillnet is removed from the water before night or immediately if visibility decreases below 500 yards (1,500 ft, 460 m);

(E) Each set is made under the observation of a spotter plane;

(F) No gillnet is set within 3 nautical miles (5.6 km) of a right, humpback, or fin whale; and

(G) The gillnet is removed immediately from the water if a right, humpback, or fin whale moves within 3 nautical miles (5.6 km) of the set gear.

(iv) *Exemption for Spanish Mackerel component of Southeast Atlantic gillnet fishery.* Fishing with gillnet for Spanish mackerel is exempt from the restrictions under paragraph (f)(4)(ii)(B) from December 1 through December 31, and from March 1 through March 31 if:

(A) Gillnet mesh size is between 3.5 inches (8.9 cm) and 4 7/8 inches (12.4 cm) stretched mesh;

(B) A valid commercial vessel permit for Spanish mackerel has been issued to the vessel in accordance with 50 CFR § 622.4(a)(2)(iv) and is on board;

(C) No person may fish with, set, place in the water, or have on board a vessel a gillnet with a float line longer than 800 yards(2,400 ft, 732 m);

(D) No person may fish with, set, or place in the water more than one gillnet at any time;

(E) No more than two gillnets, including any net in use, may be possessed at any one time; provided, however, that if two gillnets, including any net in use, are possessed at any one time, they must have stretched mesh sizes (as allowed under the regulations) that differ by at least .25 inch (.64 cm);

(F) No person may soak a gillnet for more than 1 hour. The soak period begins when the first mesh is placed in the water and ends either when the first mesh is retrieved back on board the vessel or the gathering of the gillnet is begun to facilitate retrieval on board the vessel, whichever occurs first; providing that, once the first mesh is retrieved or the gathering is begun, the retrieval is continuous until the gillnet is completely removed from the water;

(G) No net is set at night or when visibility is less than 500 yards (1,500 ft, 460 m);

(H) The gillnet is removed from the water before night or immediately if visibility decreases below 500 yards (1,500 ft, 460 m);

(I) No net is set within 3 nautical miles (5.6 km) of a right, humpback, or fin whale; and

(J) Gillnet is removed immediately from the water if a right, humpback, or fin whale moves within 3 nautical miles (5.6 km) of the set gear.

(v) *Exemption for vessels in transit with gillnet aboard.* Possession of gillnet aboard a vessel in transit is exempt from the restrictions under paragraph (f)(4)(ii)(A) of this section if: All nets are covered with canvas or other similar material and lashed or otherwise securely fastened to the deck, rail, or drum; and all buoys, high flyers, and anchors are disconnected from all gillnets. No fish may be possessed aboard such a vessel in transit.

(g) * * *

(1) *Entanglements in critical habitat or restricted areas.* If a serious injury or mortality of a right whale occurs in the Cape Cod Bay critical habitat from January 1 through May 15, the Great South Channel Restricted Area from April 1 through June 30, the Southeast U.S. Restricted Area N from November 15 through April 15, or the Southeast U.S. Restricted Area S from December 1 through March 31 as the result of an entanglement by lobster or gillnet gear allowed to be used in those areas and times, the Assistant Administrator shall close that area to that gear type (i.e., lobster trap or gillnet) for the rest of that time period and for that same time period in each subsequent year, unless the Assistant Administrator revises the restricted period in accordance with paragraph (g)(2) of this section or unless other measures are implemented under paragraph (g)(2) of this section.

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