

Dated: October 28, 1997.

Thomas Bauer,

Acting Regional Director, Region 2, Fish and Wildlife Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

Docket No. 971021250-7250-01; I.D. 092297E

RIN 0648-AK46

Endangered Fish or Wildlife; Special Prohibitions; North Atlantic Right Whale Protection

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

ACTION: Proposed rule; temporary closure of fishery.

SUMMARY: NMFS proposes to close the Mid-Atlantic and Northeast Coastal segments of the Atlantic pelagic drift gillnet fishery for swordfish, tuna, and shark through July 31, 1998. The swordfish portion of the Atlantic pelagic drift gillnet fishery has been closed since December 5, 1996, under an emergency Magnuson-Stevens Fishery Conservation and Management Act closure which expires on November 26, 1997. This action is necessary to avoid jeopardy to the continued existence of the northern right whale (*Eubalaena glacialis*), a species listed as endangered under the Endangered Species Act (ESA). The purpose of this action is to continue the existing closure of the swordfish portion of the Atlantic pelagic drift gillnet fishery and to close the tuna and shark portions of the Atlantic pelagic drift gillnet fishery until regulatory measures implementing one or more reasonable and prudent alternatives necessary to avoid jeopardy to the continued existence of the northern right whale are completed and implemented.

DATES: Written comments must be received on or before November 18, 1997.

ADDRESSES: Send comments to the Chief, Marine Mammal Division (F/PR2), Office of Protected Resources (F/PR), NMFS, 1315 East West Highway, Silver Spring, MD 20910-3282. Copies of the May 29, 1997, Biological Opinion (BO), of the August 29, 1997, Amended BO, and, a draft environmental assessment on the Atlantic Offshore Cetacean Take Reduction Plan are

available upon request from Gregory Silber, Ph.D., Marine Mammal Division, Office of Protected Resources, NMFS, 1315 East West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT:

Gregory Silber, Ph.D. or Michael Payne, Office of Protected Resources, (F/PR2), NMFS, 1315 East West Highway, Silver Spring, MD 20910, 310-713-2322; or by facsimile at 301-713-0376.

SUPPLEMENTARY INFORMATION:

The Atlantic pelagic fishery (which includes the swordfish, tuna, and shark drift gillnet fishery) is managed by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*) and the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*). Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires an agency to ensure that any action proposed by a Federal agency is not likely to jeopardize the continued existence of a threatened or endangered species. Due to new information concerning the status of the northern right whale, NMFS re-initiated consultation on the Atlantic pelagic fishery on September 25, 1996.

One right whale entanglement has been documented by a NMFS observer in Atlantic pelagic drift gillnet gear. The potential exists for further entanglements in this gear because the geographic distribution of right whales overlaps with that of the Atlantic drift gillnet fishery during part of the year. On December 5, 1996, NMFS published an emergency closure pursuant to the Magnuson-Stevens Act closing the drift gillnet fishery for swordfish in the Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea, from December 1, 1996, through May 29, 1997 (61 FR 64486). In its December 5, 1996, notice, NMFS announced that it had reinitiated consultation under the ESA for the entire Atlantic pelagic fishery (which includes the drift gillnet fishery for swordfish, tuna, and shark).

On May 29, 1997, NMFS issued a BO which concluded that continued operation of the swordfish, tuna, and shark drift gillnet portions of the Atlantic pelagic fishery was likely to jeopardize the continued existence of the northern right whale. This BO identified two reasonable and prudent alternatives for the use of drift gillnet gear that would avoid the likelihood of jeopardy for the northern right whale. The first alternative is to prohibit the use of drift gillnet gear for the taking of pelagic swordfish, tuna, and shark. The second alternative is to allow the restricted use of drift gillnet gear. Under

this alternative, drift gillnet fishing for swordfish, tuna, and shark would take place under a limited entry system with 100 percent observer coverage, time/area closures, and elimination of the derby nature of the fishery during certain times of the year.

On June 5, 1997, pursuant to the Magnuson-Stevens Act, NMFS extended the closure of the swordfish portion of fishery until November 26, 1997, or until a preferred option to avoid the likelihood of jeopardy was identified and implemented (62 FR 30775).

Based on new information on the implementation of additional right whale management measures, consultation under section 7 of the ESA was again re-initiated on August 12, 1997. On August 29, 1997, NMFS issued an amended BO identifying a third reasonable and prudent alternative to avoid jeopardy to the northern right whale from the Atlantic pelagic drift gillnet fishery. The reasonable and prudent alternative would be 100 percent observer coverage with expanded time/area closures. The BO concluded that the distribution of right whales overlaps with that of the swordfish component of the drift gillnet fishery from November 1 until July 31 and that closure of the fishery during that period is likely to avoid jeopardy for northern right whales.

NMFS is now proposing to implement the time/area closure component of the reasonable and prudent alternatives developed through this consultation process. However, there is not sufficient time to implement the alternatives identified in the BO under the Magnuson-Stevens Act. As a result, NMFS is proposing to implement this measure under the ESA on a temporary basis pending full implementation of the reasonable and prudent alternative(s). This proposed temporary closure would provide necessary protections to the northern right whale while NMFS develops a long term fishery management solution in conformance with alternatives identified in the BOs for this fishery.

The BO issued on August 29, 1997, requires that the driftnet fishery for swordfish, shark, and tunas be prohibited from operating from November 1 to July 31 to avoid jeopardy to the continued existence of northern right whales. Although the final rule version of this document will not become effective until late November, NMFS has determined that the risk to right whales from drift gillnet gear from November 1, 1997, to the effective date of this rule is remote for the following

reasons: (1) Swordfish - This proposed action would extend the existing closure for swordfish, which expires on November 26, 1997, through July 31, 1998, thereby avoiding jeopardy for the swordfish component of the drift gillnet fishery until the expiration date of the closure; and (2) Tuna and sharks - Although the tuna and shark portions of the pelagic drift gillnet fishery were not closed by the December 5, 1996, emergency closure and subsequent extension, no directed drift gillnet operations historically exist to target these species in pelagic waters during the month of November, as evidenced by the lack of landings records and the lack of requests for observer coverage required under the Marine Mammal Protection Act (MMPA). In addition, the directed fishery for large coastal sharks was closed on July 21, 1997, through December 31, 1997, because that fishery has reached its allowable quota (62 FR 32942, July 21, 1997). The directed gillnet fishery for small coastal sharks during fall and winter generally occurs south of Cape Hatteras along the Georgia and Florida coastal areas south to Sebastian Inlet, Florida (approximately 27°51' N latitude). This is a known high-use area for northern right whales during winter and, as such, was the focus of the Atlantic Large Whale Take Reduction Team established under section 118 of the MMPA. The interim final rule implementing the Atlantic Large Whale Take Reduction Plan (62 FR 39157, July 22, 1997) closes the area to drift gillnet fishing from 32°00' N latitude (approximately Savannah, Georgia) south to 27°51' N latitude from November 1 to March 31.

This proposed rule would prohibit vessels operating in the North Atlantic off the coast of the United States in waters south and east of the 100 fathom contour from having on board, fishing with, or otherwise possessing or controlling drift gillnet gear from November 1, 1997, through July 31, 1998, except as authorized under 50 CFR 229.32 (regulations implementing the Atlantic Large Whale Take Reduction Plan that allow for restricted drift gillnet operations targeting sharks in the Southeast United States, 62 FR 39157, July 22, 1997).

NMFS has prepared a draft environmental assessment on the Atlantic Offshore Cetacean Take Reduction Plan that considers several alternatives for reducing the bycatch of marine mammals in the Mid-Atlantic and Northeast segments of the pelagic drift gillnet and longline fisheries for swordfish, tuna, and shark (see ADDRESSES). Although this draft environmental assessment does not

indicate a preferred alternative for operation of these fisheries, it does include an analysis of the impact of the proposed action to close the Mid-Atlantic and Northeast segments of the pelagic drift gillnet fisheries for swordfish, tuna, and shark. A final National Environmental Protection Act document analyzing the proposed action will be available to the public upon publication of a final rule.

Section 11(f) of the ESA provides the Secretary of Commerce with broad rulemaking authority to enforce the ESA. Because the affected fisheries may harm, harass, or otherwise "take" a right whale, this rule is proposed to prevent this fishery from jeopardizing the continued existence of the northern right whale and to prevent "take" of right whales prohibited by section 9(a) of the ESA. NMFS will undertake additional management actions necessary to ensure that conduct of the Atlantic pelagic drift gillnet fishery will not jeopardize the continued existence of the northern right whale before the expiration of this rule.

This action is not intended to place restrictions on coastal drift gillnet or other gillnet fisheries in Mid-Atlantic or Northeast coastal waters (as defined under 50 CFR 229.2), other than those placed on the pelagic driftnet fisheries described in this document. These coastal fisheries are believed to include fisheries targeting bonito, little tunny, croaker, weakfish, shad, herring, striped bass, or bluefish. NMFS requests comments on how to better define or characterize such fisheries so that this and future rules regarding gear restrictions can be specifically targeted to the fisheries for which management actions are intended. Specifically, comments are requested on how best to characterize the boundaries between coastal and pelagic fisheries and/or the specific gear types (e.g., mesh size, net length) used in the different fisheries. This request was previously made in a proposed rule to define fisheries under the Marine Mammal Protection Act list of fisheries (62 FR 28657, May 27, 1997). No comments have been received to date with respect to this request.

Classification

This rule is necessary to enforce the requirements of the ESA.

NMFS has determined that this rule is not significant for purposes of E.O. 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, will not have a

significant economic impact on a substantial number of small entities as follows:

I certify that the attached proposed rule to close the Mid-Atlantic and Northeast Coastal segments of the Atlantic drift gillnet fisheries for swordfish, tuna, and shark through July 31, 1998, issued under authority of the Endangered Species Act, will not have a significant economic impact on a substantial number of small entities, as defined under the Regulatory Flexibility Act. Between 1987 and 1995, over 1,500 vessels were permitted to participate in the swordfish fishery. Twelve to fifteen of these vessels use drift gillnet gear primarily to target swordfish. All are also permitted to take tuna and shark. All of the vessels fishing for swordfish, tuna, and shark with drift gillnet gear are small entities.

Because NMFS has traditionally apportioned swordfish quota into two semi-annual seasons, fishing effort in the swordfish fishery has traditionally consisted of a summer and a winter season. However, two Magnuson-Stevens Fishery Conservation and Management Act closures have closed the swordfish component of this fishery since December 1996. For 1998, consistent with the BO on the Atlantic pelagic fishery, the proposed rule would prohibit the use of drift gillnet gear during the winter season, and delay the summer season until after July 31, 1998. NMFS has also taken a separate action to apportion the 1998 swordfish quota into one fishing period. Thus participants in this fishery would have the opportunity to fish for the full annual quota during the period of non-closure.

Most pelagic drift gillnet fishing occurs during the summer when swordfish are concentrated off the northeastern U.S. Based on logbooks submitted to NMFS, typically only one vessel has participated in the winter drift gillnet swordfish fishery. Therefore, restricting fishing effort to the summer season should not impact a substantial number of small entities and should result in only minimal economic impacts. Prior to 1991, when drift gillnetters were not restricted by a semi-annual quota, fishing occurred as late as the fourth quarter (October, November, and December). Therefore, delaying the start date of the fishery until August 1, 1998, is not expected to significantly impact fishing effort or landings.

This proposed rule would have no impact on drift gillnetters directly fishing for sharks in the Southeast because participants in the directed shark fishery are covered by regulations implementing the Atlantic Large Whale Take Reduction Plan and would not be further restricted by this proposed rule. In addition, the fishery for large coastal sharks was closed on July 21, 1997, through December 31, 1997, because that fishery has reached its allowable quota (62 FR 32942, July 21, 1997). Based on recent records and the lack of requests for observer coverage as required under the Marine Mammal Protection Act, there is no history of a

directed drift gillnet fishery for tunas in the winter and early summer.

Accordingly, this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

As a result, no Initial Regulatory Flexibility Analysis has been prepared.

This proposed rule would be implemented in a manner that is consistent, to the maximum extent practicable, with the coastal zone management programs of the Atlantic and Gulf of Mexico states that have approved programs. This determination has been submitted for review by the responsible agencies under section 307 of the Coastal Zone Management Act.

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

collection-of-information requirements subject to the Paperwork Reduction Act.

List of Subjects in 50 CFR Part 222

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

Dated: October 28, 1997.

David L. Evans,

*Deputy Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

For the reasons set forth in the preamble, 50 CFR part 222 is proposed to be amended as follows:

PART 222—ENDANGERED FISH OR WILDLIFE

1. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531–1543.

2. In subpart D, a new § 222.34 is proposed to be added to read as follows:

Subpart D—Special Prohibitions

§ 222.34 Restrictions on taking right whales incidental to fishery operations.

During the period from November 1, 1997, through July 31, 1998, it is unlawful for any person or vessel subject to the jurisdiction of the United States to have on board a vessel, to fish with, or otherwise to possess or control drift gillnet gear, as defined in 50 CFR 229.2, in the North Atlantic Ocean in waters off the coast of the eastern United States south and east of the 100 fathom contour except that such gear may be used in southeast waters, as defined under 50 CFR 229.2, if that gear is used in compliance with the requirements of 50 CFR 229.32(f).

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