

for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the CAA, 42 U.S.C. 7607(b)(2).)

Under 5 U.S.C. 801(a)(1)(A) added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 58

Environmental protection, Air pollution control, Intergovernmental relations.

Dated: January 21, 1997.

A. Stanley Meiburg,
Acting Regional Administrator.

Part 58 of chapter 1, title 40 of the Code of Federal Regulations is amended as follows.

PART 58—[AMENDED]

1. The authority citation for part 58 is revised to read as follows:

Authority: 42 U.S.C. 7410, 7601(a), 7613, 7619.

Appendix D—[Amended]

2. In Appendix D, the table in section 2.5 is amended by revising the entries for Alabama, Georgia, and Mississippi to read as follows:

Appendix D—Network Design for State and Local Air Stations (SLAMS), National Air Monitoring Stations (NAMS), and Photochemical Assessment Monitoring Stations (PAMS).

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2.5 * * *

OZONE MONITORING SEASON BY STATE

State	Begin month	End month
Alabama	Apr	Oct.
* * *	* * *	* * *
Georgia	Apr	Oct.
* * *	* * *	* * *
Mississippi	Apr	Oct.
* * *	* * *	* * *

[FR Doc. 97-3520 Filed 2-12-97; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

RIN 1018-AD69

Migratory Bird Hunting; Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds; Supplemental

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final Rule.

SUMMARY: The Fish and Wildlife Service (hereinafter Service) is supplementing the rule prescribing the late open season, hunting hours, hunting areas, and daily bag and possession limits for general waterfowl seasons in South Dakota that appeared in the Federal Register on September 27, 1996 (61 FR 50738).

DATE: Effective on February 13, 1997.

FOR FURTHER INFORMATION CONTACT: Paul R. Schmidt, Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms 634—ARLSQ, 1849 C Street, NW., Washington, DC 20240, (703) 358-1714.

SUPPLEMENTARY INFORMATION: In the September 27, 1996, Federal Register (61 FR 50738), the Service published a final rule prescribing the late open season, hunting hours, hunting areas, and daily bag and possession limits for general waterfowl seasons and certain other migratory bird seasons in the conterminous United States. Public comment was received on the proposed rules for the seasons and limits contemplated herein. These comments were addressed in the Federal Registers dated August 29, 1996, (61 FR 45836) and September 26, 1996 (61 FR 50662). This supplement involves no change in substance in the contents of the prior proposed and final rules. In the case of South Dakota, the State has elected to select the remaining allowable hunt days permitted under the existing frameworks for snow geese.

Dated: February 3, 1997

George T. Frampton, Jr.
Assistant Secretary for Fish and Wildlife and Parks.

PART 20—[AMENDED]

For the reasons set out in the preamble, title 50, chapter I, subchapter B, Part 20, subpart K is amended as follows:

1. The authority citation for Part 20 continues to read as follows:

AUTHORITY: 16 U.S.C. 703-712; and 16 U.S.C. 742 a-j.

§ 20.105 [Amended]

2. In Section 20.105, paragraph (e) is amended by revising the Season Dates for South Dakota, subheading Light Geese, to read "Sept. 28-Dec. 22 & Feb. 18-Mar. 10."

[FR Doc. 97-3657 Filed 2-12-97; 8:45 am]

BILLING CODE 4310-55-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 217 and 222

[Docket No. 960730211-7020-02; 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: Interim final rule.

SUMMARY: Disturbance is identified in the Final Recovery Plan for the Northern Right Whale (Recovery Plan) as among the principal human-induced factors impeding recovery of the northern right whale (*Eubalaena glacialis*) (NMFS, 1991). NMFS is issuing this interim final rule to restrict approaches within 500 yards (460 m) of a right whale, whether by vessel, aircraft or other means, in an attempt to reduce the current level of disturbance and the potential for vessel interaction and injury. This rule requires right whale avoidance measures if a vessel or aircraft is within the 500-yard (460 m) restricted area. Generally, vessels are required to immediately depart from the area at a slow, safe speed in a direction away from the whale. Exceptions are provided for emergency situations, where certain authorizations are provided for aircraft operations (unless the aircraft is conducting whale watch activities), for certain right whale disentanglement/rescue efforts and investigations, and for a vessel restricted in its ability to maneuver and unable to comply with the right whale avoidance measures.

EFFECTIVE DATE: March 17, 1997.

FOR FURTHER INFORMATION CONTACT: Margot Bohan, 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

The northern right whale is recognized as the world's most endangered large whale species. Recent mortalities off the Atlantic coast of the United States have caused escalating concern for the western North Atlantic population, especially with regard to the population's vulnerability to human interaction.

The preamble to the proposed rule discussed the critically endangered status of the western North Atlantic population of the northern right whale (right whale), the distribution pattern of these whales near the east coast of the United States, and the existence of vessel and related human activities in these areas that pose a significant risk to right whales. In particular, where human activities coincide with the distribution of right whales off the coast of the United States, such as vessel traffic, there is the potential that right whales may be disturbed or have their behavior altered, conceivably being injured or killed as a result. (For a more complete discussion of these issues, see the preamble to the proposed rule (61 FR 41116, August 7, 1996) and the environmental assessment).

Since the proposed rule was issued, additional information has become available concerning the right whale population. Another right whale mortality was observed in early January 1997. A neonatal male calf was found stranded on Flagler Beach, FL; reports from a preliminary examination suggest that the whale may have died from birth trauma or other natural causes. Thus, since 1995, there have been 14, possibly 15, known serious injuries and/or mortalities of right whales off the Atlantic coast (5 due to entanglement, 3 due to ship strikes, 5 due to unknown or natural causes, and 1 death in 1996 due to ship strike of a whale injured by an entanglement in 1995). Furthermore, in early 1996, an increase in estimated mortalities was reported for the years 1994 and 1995. However, a preliminary analysis of right whale photo-identification data suggests that total right whale mortality cannot be estimated reliably because of a shift in photo-identification sighting efforts (Hain, et al., 1996 (in draft)). Significant uncertainties remain concerning the current population status and trends. Regardless of the uncertainties, the precarious state of the right whale population strongly suggests that human activity, which results in disturbance,

and, thus, an increased potential for injury and mortality, may have a greater impact on population growth rates and trends relative to other whale species.

This rule is issued as an interim final rule to allow NMFS and state coastal management agencies to consider more fully whether this rule will affect approved Coastal Zone Management Programs in states along the east coast. NMFS determined that the proposed rule, if implemented would be consistent to the maximum extent practicable with federally-approved coastal zone management programs, pursuant to the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*, but through an oversight, the proposed rule was never sent to the responsible state agencies for review. NMFS has issued a similar determination with respect to this interim final rule and has requested the responsible state agencies to expedite their review.

In addition, other agencies have objected to the issuance of any regulatory definition for the "territorial sea," as this term is used under the Endangered Species Act (ESA) and associated regulations. NMFS is not issuing such a definition in this interim final rule in order to have additional time to consult with other Federal agencies; this issue will be resolved prior to issuing a final rule.

The authority for the interim final regulation restricting approaches to right whales is pursuant to both the ESA and the Marine Mammal Protection Act (MMPA), as was proposed. NMFS has concluded that this regulation is an appropriate mechanism to carry out the purposes of the MMPA. Likewise, the rule is an appropriate mechanism to promote conservation, to implement recovery measures, and to enhance enforcement under the ESA. Section 11(f) of the ESA provides the Secretary of Commerce with broad rulemaking authority to enforce the provisions of the ESA. For example, given the potential that close approaches to right whales could harm, harass, injure or otherwise "take" a right whale, this interim final rule is issued to more fully implement the protections established under section 9(a) of the ESA. In addition, NMFS is required to develop and implement recovery plans under section 4(f) of the ESA and the Recovery Plan notes that disturbance and vessel interactions should be reduced. Lastly, all Federal agencies have an obligation under ESA section 7(a)(1) to use their authorities to further the purposes of the ESA to conserve species.

Changes From the Proposed Rule

On August 7, 1996, NMFS published a proposed rule to prohibit all approaches within 500 yards (460 m) of a right whale, whether by vessel, aircraft or other means. NMFS also proposed to restrict head-on approaches, to prohibit any vessel maneuver that would intercept a right whale, and to require right whale avoidance measures under specified circumstances. Exceptions were proposed for emergency situations and where certain authorizations were provided.

This interim final rule differs from the proposed rule in several important respects, and modifications were made for various reasons discussed below. First, NMFS endeavored to simplify and clarify the regulatory language of the rule. Second, changes were made to enhance the enforceability of the rule. Third, changes were made in response to comments received during the 90-day comment period for the proposed rule. Changes to the proposed rule include the following:

Definitions

The definition of "right whale" is added to the definitions section in 50 CFR part 217, instead of 50 CFR part 222. The substance and applicability of the definition is unchanged.

The interim final rule also adds a definition for "vessel restricted in her ability to maneuver" that refers to the definition in Rule 3 of the Inland Navigation Rules (33 U.S.C. 2003). A similar definition is used in the COLREGS Rule 3 (See 33 CFR Part 81 App. A, Part A, Rule 3).

Head-on Approaches

The proposed rule would have prohibited a vessel from approaching a right whale head-on from any distance once the right whale was observed or should have been observed by a vessel operator using due diligence and once there had been time to alter the heading of the vessel. The interim final rule does not include this prohibition. NMFS concluded that this prohibition would be very difficult to enforce and that the general restrictions on approaches within 500 yards (460 m) of a right whale should provide adequate protection. Nevertheless, while not required by regulation, NMFS continues to encourage vessel operators to avoid head-on approaches of right whales (see *Right Whale Avoidance Guidance* in the Summary of Protective Measures for details).

Interception

The proposed rule would have prohibited a vessel from turning,

positioning, or maneuvering in a manner to intercept a right whale. The interim final rule does not contain this language but maintains the general requirement by prohibiting any approach "by interception." This stylistic change reflects the fact that actions designed to intercept a right whale constitute a form of approach. This interpretation is consistent with the view currently taken by NMFS in implementing the approach restrictions governing humpback whales in the Hawaiian islands.

At this time, NMFS is not defining the term "interception." With this prohibition, however, NMFS intends to prohibit positioning or maneuvering that is calculated to bring a vessel or aircraft within 500 yards (460 m) of a right whale.

Right Whale Avoidance Measures

The proposed rule contained a detailed list of right whale avoidance measures in its regulatory requirements. Right whale avoidance measures were described, generally, as actions necessary to avoid takings prohibited under the MMPA or the ESA and actions necessary to comply with instructions from NMFS, the U.S. Coast Guard and other agencies concerning the avoidance of right whales. If a person, aircraft, vessel or other object were to come within 500 yards (460 m) of a right whale, right whale avoidance measures were to be followed to increase the person or object's distance from the whale. The proposed rule also provided specific guidance concerning how to increase one's distance from a right whale: (1) Sudden changes in operation were to be avoided unless necessary to avoid striking or injuring a right whale or for safe vessel or aircraft operation, (2) if one were already moving away from a right whale, approximately the same speed and direction should be maintained, (3) if one was 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 were not applicable under certain circumstances such as when a vessel was not underway or was restricted in its ability to maneuver.

Though still in the interim final rule, these avoidance measures have been scaled back significantly. NMFS has decided that more concise avoidance measures will enhance enforceability and will allow the use of avoidance measures that are appropriate, given the

unique circumstances of any situation that is encountered.

Specifically, this interim final rule removes the general description of right whale avoidance measures as written in the proposed rule. NMFS has concluded that there is no need to repeat the statutory prohibition on taking pursuant to the ESA and MMPA. In addition, NMFS removed the regulatory requirement, as written in the proposed rule, for compliance with instructions from NMFS, the U.S. Coast Guard and other agencies, although that information may be relevant in assessing the seriousness of a violation.

Furthermore, NMFS has excluded from this rule specific regulatory requirements concerning the steps to be taken to increase one's distance from a right whale. Instead of the detailed instructions provided in the proposed regulations, the interim final regulations simply require that, if within 500 yards (460 m) of a right whale: (1) Vessels that are underway must steer a course away from the right whale and immediately leave the area at a slow safe speed; and (2) aircraft must take a course away from the right whale and immediately leave the area at a constant airspeed.

Notwithstanding these modifications, NMFS wishes to provide guidance that will assist individuals who find themselves within 500 yards (460 m) of a right whale. To that end, NMFS is providing *Right Whale Avoidance Guidance* (see Summary of Protective Measures). This guidance embraces many of the avoidance measures set forth in the proposed rule.

General Exceptions

Exceptions to the approach restrictions and the avoidance measures were listed separately from the more limited exceptions applicable only to the avoidance measures in the proposed regulations. This interim final rule groups all exceptions together. In addition, the interim final rule states clearly that a person claiming the benefit of any exception has the burden of proving that the exception is applicable.

Aircraft. The proposed rule would have prohibited approaches by aircraft within 1500 feet (460 m) of a right whale, regardless of whether the aircraft was involved in whale watching activities. NMFS has substantially modified this provision in order to limit the restrictions to aircraft-related activities of greatest concern. As modified, a broad exception is provided to the approach restrictions and avoidance measures so that these provisions only apply to aircraft that are conducting whale watching activities.

Vessels at anchor or mooring. The proposed rule included an exception from the requirement to undertake right whale avoidance measures for vessels that are not underway. The interim final rule maintains this requirement, but in a stylistically different manner. In the interim final rule, the exception is removed, but the avoidance measures are modified to apply only to vessels that are "underway." As with the proposed rule, the term underway is defined to mean vessels not at anchor, made fast to the shore, or aground.

Right whale investigation or rescue efforts. This interim final rule provides an exception to the approach prohibitions and avoidance measures in a situation when a person is approaching to investigate a right whale entanglement or injury, or to assist in the disentanglement or rescue of a right whale; however, permission must be received from NMFS or a NMFS designee prior to the approach. The proposed rule did not include a similar exception; this addition in the interim final rule is in response to several commenters' requests.

Emergency situations. Both the proposed and interim final rules include an exception for emergency situations. The language of this exception is changed somewhat from the proposed rule. In addition, the recommendation within the regulatory text to contact, if possible, NMFS, the U.S. Coast Guard, local port authority, or local law enforcement officials is removed in the interim final rule, although such action may help establish that the exception is applicable in a particular situation.

Responses to Comments on the Proposed Rulemaking

Fifteen commenters responded to the proposed rule's request for comments; all submissions were considered in the preparation of this interim final rule. Responses to comments addressing significant issues and requiring a reply are summarized below:

Comment 1: Usage of the term "disturbance" in this rule. One commenter recommended that NMFS avoid equating the disturbance of marine mammals with "harassment," explaining that the parallel is purely speculative.

Response: The 1994 amendments to the MMPA included the following definition:

(18)(A) The term "harassment" means any act of pursuit, torment, or annoyance which—(i) has the potential to injure a marine mammal or marine mammal stock in the wild; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing the disruption of

behavioral patterns, including, but not limited to, migration, breathing, nursing, feeding or sheltering.

Based on the best available information, NMFS has determined that, in general, close approaches to right whales by vessels, aircraft and other means have the potential to disturb or injure these animals. (For further information concerning disturbance, see also the response to *Comment 2* below.) NMFS also recognizes that not every approach within 500 yards (460 m) of a right whale necessarily results in harassment. Nonetheless, because of the precarious status of this species, NMFS has concluded that a general restriction on these types of approaches is justified.

Comment 2: The size of the buffer zone. Three commenters remarked on the lack of sufficient data to support a 500 yard (460 m) protection zone and demonstrate that it is an appropriate distance to protect right whales from behavioral disturbance. One of these commenters cited ESA section 4, which requires the publication of a summary of the data on which a regulation is based, showing the relationship of such data to the proposed/final regulation. The same commenter explained that 500 yard (460 m) zone is not correlated to the observational capabilities of ship operators or the operational capabilities of their vessels. Additional study to determine the appropriate distance was recommended. Implementation of other measures in conjunction with the approach restriction was also recommended.

In favor of the proposed rule, a fourth commenter stated that although 500 yards (460 m) may be a greater distance than necessary and may be difficult to accurately measure, it will prevent intentional close approach by vessels if it is enforced. Another commenter explained that the 500 yard (460 m) approach prohibition makes the protection of right whales in Federal waters consistent with that provided in Massachusetts State waters, where such a prohibition already exists; it is an important step in providing basic protection.

Response: NMFS has determined that a 500 yard (460 m) buffer zone is appropriate. The Recovery Team concluded that observers (lookouts) with knowledge or training should be able to distinguish right whales from other whale species at this distance. NMFS has determined that such a buffer will 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. NMFS recognizes operational limitations, such as difficulties in establishing distances at sea in an enforcement action, that may reduce the actual zone of protection. NMFS also notes that such an approach is consistent with Massachusetts' regulations.

As indicated in the preamble to the proposed rule, right whales are vulnerable to disturbance or injury as a result of close approaches by vessels or other means. Right whales are slow-moving. This limitation and other behavioral characteristics make this species particularly susceptible to close approaches by humans. Vessel traffic may subject whales to impacts ranging from displacing cow/calf pairs from nearshore waters to expending increased energy when feeding is disrupted or migratory paths rerouted.

Furthermore, as indicated in the preamble to the proposed rule and described in more detail in the environmental assessment, turbulence associated with vessel traffic may indirectly affect right whales by breaking up the dense surface zooplankton patches in certain whale feeding areas. Right whale energetics are such that they are particularly dependent on very dense zooplankton aggregations for feeding. If copepods in the caloric-rich, adult developmental stages are not available to right whales in sufficient densities, there may be insufficient prey available in the remaining developmental stages (independent of abundance) to provide right whales with the required energy densities (as described by Kenney et al., 1986) to meet the metabolic and reproductive demands of the right whale population in the western North Atlantic (Kenney et al., 1986; Payne et al., 1990).

Prey distribution and density are believed to be among the primary governing factors in whale distribution and density in an undisturbed ecosystem. The presence of vessels in or adjacent to areas occupied by whales may cause a change in whale behavior, such as cessation of feeding activity, for the duration of the human activity. Such activity levels may cause the whales to leave localized feeding areas temporarily. Repeated disturbance of the whales may result in the abandonment of localized feeding areas. Any loss of feeding habitat or interference with feeding activities may affect the ability of these whales to obtain the full summer ration of food necessary for successful reproduction and overwintering. The severity of this loss would depend on the level of interference with feeding activity or on

the availability of alternative food supplies.

While the proposed rule recognized that data and evidence of disturbance or behavioral changes induced by human activity or interactions beyond 100 yards (90 m) was limited, NMFS has considered the best available information on this issue. The critically endangered status of this species was another important consideration in establishing the appropriate size of the buffer zone. Finally, operational and practical considerations also were evaluated, such as the maximum distance at which a right whale could be identified, and difficulties in estimating distance at sea. Based on these considerations, NMFS has concluded that the area of protection around right whales should be maximized to avoid any potential for disturbance or behavioral changes and to reduce, if possible, the risk of collision; thus, a 500 yard (460 m) buffer area is appropriate.

Comment 3: Situations where the identification of the whale species is uncertain. Two commenters expressed notable support for the implementation of species-specific protective measures. According to these commenters, since right whales make up such a small fraction of the whales sighted on whale watches, it would be an undue burden on industry to limit approaches to all whales because of the remote possibility that the whale is a right whale.

Two other commenters expressed their support for a rule establishing comprehensive protection for all listed whale species, rather than partial protection on a species-by-species basis. They cited the July 22, 1996, U.S. Coast Guard Biological Opinion as a model of protection to follow and recommended revision to the proposed rule to make it a generally applicable rule that could be amended according to whatever species-specific information may be learned as part of the initiative. The rule, according to these commenters, also should establish the presumption that any whale not positively identified as another whale species must be considered a northern right whale; the fact that only the northern right whale is afforded a buffer zone presupposes that all boaters will be able to identify a northern right whale. One of these two commenters claimed that if NMFS denies any listed whales the protection of a distance rule, the operators of commercial whale watching vessels must be required to obtain incidental take permits, pursuant to section 10 of the ESA and a small take permit, pursuant to section 101(a)(5) of the

MMPA before being allowed to conduct whale watching.

Response: NMFS recognizes that under certain circumstances regulations are appropriate to address specific species in a particular area or region. Oftentimes, differences in species and marine habitat merit differences in regulatory approach. This rule pertains only to the western North Atlantic population of northern right whales. 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 in 1993, in part, because it was viewed as being too broad in scope (see 58 FR 16519, March 29, 1993). At that time, NMFS began an initiative to concentrate efforts regarding marine mammal approach on a more species- and region-specific basis.

NMFS recognizes that in some situations it may be difficult for a person to differentiate between a 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 this interim final rule, a person is advised to avoid approaches within 500 yards (460 m) of any 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 did not propose restrictions on approaches to any species except right whales. As indicated above, NMFS believes that such restrictions should be evaluated on a species- and region-specific basis, and NMFS has not completed those evaluations at this time.

With respect to the need for an incidental take permit for approaches to endangered whales, NMFS notes that this interim final rule does not authorize any approach that would constitute a "taking" under the ESA or MMPA. Such approaches are prohibited by statute unless a permit or other authorization is obtained; the fact that these types of approaches are not prohibited explicitly in this interim final rule should not be interpreted as any type of authorization for the taking of an endangered whale. On the other hand, NMFS also recognizes that whether a specific approach constitutes a "taking" and thus would require an incidental take

permit must be determined on a case-by-case basis. NMFS declines to make any determination concerning the necessity of such a permit in the context of this interim final rule.

Comment 4: Applicability of rule to various approach activities. Three commenters recommended that a provision be added to the list of "Exceptions," whereupon, with proper notification to either NMFS and/or the Coast Guard, a vessel would be authorized to approach to within less than 500 yards (460 m) for the purpose of confirming a right whale entanglement, reporting the nature of its distress, and/or awaiting help. Concern exists with regard to the potential for missing valuable sightings of right whale entanglements or distress because of the 500 yard (460 m) distance restriction. One of these commenters recommended that the regulations include a provision or be issued with a commitment of funding to ensure that each right whale may be approached briefly for a health assessment and photo-identification.

Response: NMFS agrees with the commenters' recommendation to include a provision to allow vessel approaches within less than 500 yards (460 m) in imminent circumstances regarding the whale's health and well-being. The provision is in place under the list of "Exceptions" (§ 222.32(c)) to enable close approaches to investigate a right whale entanglement or injury, or to assist in the disentanglement or rescue of a right whale, provided that permission is received from NMFS or a NMFS designee prior to the approach. In response to the comment recommending implementation of an approach provision for right whale health assessments and photo-identification, researchers may apply for a scientific research permit issued under subpart C (Endangered Fish or Wildlife Permits) of part 222.

Comment 5: Deliberate versus unintentional approaches. Three commenters recommended that the rule's prohibitions and mandated evasive maneuvers should apply only to explicit actions with the deliberate intent of approaching a right whale. Another commenter stated that the rule is overly broad in scope and attempts to regulate many activities that do not threaten physical harm to right whales. It should eliminate actions that have little or no potential to cause serious injury or mortality, such as small vessel activities, vessels traveling at very slow speeds and swimmers. According to this commenter, the rule should limit activities only during the time periods and in the geographic areas where right

whales are known to congregate and where critical habitat is established, as shown by scientific data. Two other commenters recommended being explicit if whale watching is in fact the focus of the rule; the rule should be revised to narrowly address these activities.

Response: Though some activities present only a limited potential to disturb or injure right whales, NMFS believes that an expansive approach prohibition is necessary. This view is predicated upon the highly endangered status of the species, and the need to minimize those risks associated with any type of approach. Additionally, such an approach is easier to understand and enforce, thereby enhancing its overall effectiveness.

Given this rationale, the prohibition on approach applies to both intentional and unintentional approaches. This restriction reflects the fact that both intentional and unintentional approaches create a risk of disturbance or injury. Additionally, this restriction is consistent with both the MMPA and ESA, which prohibit all takings, including those that are intentional, unintentional, and incidental.

Having said this, NMFS does not wish to extend this prohibition to activities that clearly present little risk to right whales. For this reason, NMFS has modified the regulation as it applies to aircraft, only prohibiting approaches by aircraft conducting whale watching activities.

Comment 6: Vessels restricted in their ability to maneuver in certain situations—Exceptions to the rule. Two commenters requested confirmation that the proposed rule exemption granted to vessels restricted in their ability to maneuver is applicable to their situation. Another commenter requested special consideration for submerged operations where a posted lookout is not possible and where there is limited or no ability for a submerged vessel to detect the presence of right whales and to execute recommended evasions or altered courses. A fourth commenter recommended that vessels "in extremis," as defined by the Convention on the International Regulations for Preventing Collisions at Sea, 1972, be added to proposed § 222.32(d)(2).

Response: The interim final rule recognizes the special circumstances presented by a vessel restricted in its ability to maneuver; right whale avoidance measures are not required under such circumstances. Under the COLREGS Rule 3 (See 33 CFR part 81 App. A, Part A, Rule 3) and Rule 3 of the Inland Navigation Rules (33 U.S.C. 2003) a vessel restricted in its ability to

maneuver includes, but is not limited to, a vessel engaged in dredging, a vessel engaged in submerged operations, a vessel engaged in launching or recovery of aircraft, a vessel engaged in a towing operation that severely restricts the towing vessel and the tow in their ability to deviate from their course, and various other types of vessels. NMFS interprets this definition to include a fishing vessel engaged in haulback operations and vessels in similar situations where the vessel is unable or severely limited in its ability to comply with right whale avoidance measures. To the extent that the vessel is able to maneuver in a situation where it is within 500 yards (460 m) of a right whale, it should undertake efforts to maximize its distance from and minimize interactions with the whale.

In formulating this exception, NMFS recognizes the unique, and oftentimes limiting, circumstances facing vessels operating in the Atlantic and along its coastline. Unlike Hawaii, where humpback whales are generally found nearshore and the humpback whale approach restrictions largely impact recreational vessel activity, the Atlantic distribution of right whales is more variable and the right whale approach prohibitions affect a multi-use and highly trafficked water body.

NMFS also acknowledges that what constitutes a proper lookout depends upon the prevailing conditions and circumstances and that submarine operations are somewhat unique. Maintaining a proper lookout for a submarine may include the use of sonar or other available means under the circumstances; NMFS also encourages communication efforts with submarines before the submarines enter critical habitat or areas of high use by right whales so that sighting information may be relayed to the operator. Finally, with respect to a vessel *in extremis*, NMFS has concluded that the emergency exception is applicable because of the serious and imminent threat to the vessel or person in such a situation.

Comment 7: Appropriate speed. One commenter recommended that NMFS adopt a generic rule requiring vessel operators to adjust their vessel speed and direction when whales are observed. Another commenter questioned the absence of a rationale for the exclusion of speed limits in the proposed rule.

Response: NMFS recognizes that it may be necessary, under certain circumstances, for vessels, especially large ships, to reduce speed in order to avoid prohibited approaches to right whales. 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 U.S.C. 2006. These and other regulations limiting vessel speed should be interpreted with a consideration of the risk of a close approach to a right whale.

While vessel speed remains a concern with regard to right whale avoidance, NMFS also recognizes that other agencies and organizations may have special expertise and authority with respect to this subject and that specific or detailed guidance on speed may depend on the operational characteristics of a vessel or the circumstances under which it is operated. The focus of the proposed rule and this interim final rule is on restricting approaches within 500 yards (460 m) of a right whale. In that respect, this interim final rule requires that vessels within the restricted area immediately leave the area at a slow safe speed. NMFS encourages adherence to the speed regulations already in place, but it declines to adopt further speed restrictions in this interim final rule.

Comment 8: Aircraft. One commenter stated that actions having little or no potential to cause serious injury or mortality, such as military aircraft approaches and overflights, small vessel activities, should be eliminated from the rule, i.e., only limit the class of actions that may physically harm right whales. Two additional commenters claim that NMFS overlooks military aircraft maneuvers, especially in the southeast United States while right whales are in calving grounds, and overlooks what type of regulations the military have to follow for these exercises; exceptions should be made in some cases. A fourth commenter remarked that the 500 yard (460 m) prohibition may impact aircraft takeoffs and landings in an unacceptable manner for safety, glide path and air traffic operations.

Response: NMFS has reconsidered its original proposal to limit all aircraft to an altitude of no less than 1500 feet (460 m) above a right whale. As modified in the interim final rule, a broad exception is provided for most aircraft operations so that approach restrictions and avoidance measures are applicable only to aircraft conducting whale watching activities.

Comment 9: Economic impacts. One commenter remarked that the avoidance measures may result in substantial

delays to shipping and, thus, increase costs to the industry. According to this commenter, there is no evidence that NMFS has actually calculated the chances that a vessel would have to adhere to avoidance measures; nor has NMFS calculated the effect of those measures on the vessel's arrival in port and transportation costs. A second commenter suggested that transportation costs are likely to increase for commercial vessels based on increased transit time as a result of this regulation.

Response: NMFS concluded that the proposed rule, if implemented, would not have a significant economic impact on a substantial number of small entities. While this rule may have a minor impact on whale watching activities, especially in early spring when right whales, but no other whale species, are likely to be in the area where these activities occur, the cost of delaying operations for a few weeks, with respect to expected revenues, is not considered significant.

Similarly, this rule is expected to have only a minor impact on commercial shipping and other vessel activities. Adjustments to speed or a more vigilant lookout would be appropriate under current law to avoid the risk of taking a right whale, especially in areas where, and at times when, right whales are known or expected to be present. In light of existing law, any change in operation and any costs associated with these changes in operation necessitated by the implementation of this interim final rule are not considered significant when compared to expected revenues.

Comment 10: Additional research needs—Cumulative effects. Three commenters recommended implementation of a research component to examine existing and future technologies and methods that may lead to the healthy coexistence of human activities and these species, e.g., increased surveillance of right whale movement, assessment of shipping traffic relative to high risk areas; determination of what distance disrupts feeding behavior and establishment of this distance restriction on feeding grounds; evaluation of deterrents including sonar; and, finally, a follow-up on the New England Aquarium/MIT ship modeling study to include (a) other vessel types, and (b) the depth dimension. According to one of the commenters, a distance rule should be based on studies of the reactions of right whales to vessel approaches with varying sound signatures, and the effect of vessels of dense plankton aggregations at or near the surface.

Another of the three commenters suggested that, although additional study was necessary to determine the appropriate right whale approach distance, an interim rule could be implemented in the meantime to prohibit commercial and recreational whale watching programs from focusing on right whales. Two additional commenters remarked on the potential for inaccuracies when making cross-species behavioral comparisons.

Response: NMFS acknowledges that long-term studies in this area are needed. However, the absence of definitive long-term research results does not preclude the adoption of protective measures. The ESA generally requires NMFS to use the best available information in managing protected species. In this case, the available information reviewed by NMFS indicates that right whales may be disturbed by human activity, especially close approaches within 500 yards (460 m). NMFS believes there is sufficient information available to support this action. (See also the response to *Comment 2*.)

NMFS may revise protection efforts accordingly if future research demonstrates that additional or different means of protection are needed. Other human-induced factors mentioned in the Recovery Plan that pose a threat to the right whales will be addressed in separate rulemakings or through other management initiatives.

Additionally, immediate protective measures are appropriate since they represent an important step in increasing public awareness of the problems caused by disturbance and vessel interactions with right whales. Finally, these regulations will complement other initiatives, such as efforts to communicate information concerning the location of right whales to vessel operators and any initiatives that may be undertaken internationally, as well as efforts to undertake further research.

Comment 11: Noise. Two commenters suggested that, in terms of the harm caused to whales by vessels, the cumulative effect (noise) of many vessels in a limited area is one of the most serious concerns in that it may cause abandonment or decrease in use of important right whale habitats.

Response: NMFS recognizes that this problem warrants further study. While not specifically designed for this purpose, this interim final rule may reduce vessel noise in the vicinity of right whales by restricting human approaches.

Comment 12: Enforcement/compliance. According to one

commenter, the definition "to approach head on" is subjective and will be difficult to enforce. A vessel operator could easily argue an intention to change course to avoid intercepting a whale; enforcement officials could not easily refute this argument. This commenter also recommended that NMFS remove proposed §§ 222.32(b)(4) and (5) that would have required vessels not to approach a right whale head-on from any distance once observed and identified or to cause a vessel to be turned positioned or maneuvered in a manner to intercept a right whale. According to the commenter, these restrictions are vague and are drafted to preclude maneuvers at any distance from a sighted right whale, which could impact vessel operation for miles.

Two other commenters believe that enforcement of the regulation and/or prosecution for violations would be extremely difficult, given the somewhat subjective nature of the approach standards. To minimize or eliminate concerns regarding the inability to enforce conservation measures and to conduct measures of environmental protection or navigational aid, especially in cases of emergency, one of these commenters suggested including a third exception under § 222.32(d)(3): "Coast Guard law enforcement, marine environmental protection and aid to navigation operations."

Another commenter requested that NMFS outline what enforcement it proposes and how the results of the rule will be reported to the public. The same commenter requested clarification of the second paragraph in the first column on page 41119 of the proposed rule (61 FR 41119, August 7, 1996), in that it currently implies that violation of this rule would not be considered an incidental take. This commenter also wanted to know how NMFS will address/enforce right whale protection at night, in rain, fog or high sea states to ensure whales are not disturbed.

A final commenter remarked that the prohibitions and avoidance measures in the proposed rule may result in vessel movement that would conflict with USCG Traffic Separation Schemes for the Atl. East Coast, 33 CFR part 167 *et seq.* and Rule 10 of the International Regs for Preventing Collisions at sea 33 foll. § 1602, Rule 10, rules that provide safe access routes for vessels proceeding to and from U.S. ports.

Response: NMFS has reconsidered its original proposal to prohibit head-on approaches to right whales. NMFS recognizes that this provision would be difficult to interpret and enforce; that provision is not included in this interim final rule. On the other hand, while not

required by regulation, NMFS continues to encourage vessel operators to avoid head-on approaches of right whales.

While NMFS has concluded that, in general, approaches within 500 yards (460 m) of right whales have the potential to disturb or injure these animals, NMFS also recognizes that whether an incidental take occurs in any specific approach may depend on the circumstances of that approach. NMFS also recognizes that circumstances such as rain, fog, sea state, and visibility may affect the ability of an operator to avoid close approaches to right whales. Extra caution is urged in these situations. In addition, NMFS is working with other agencies and organizations to enhance vessel traffic coordination. (See response to *Comment 15*.)

NMFS disagrees with claims that these approach and avoidance requirements are unenforceable. The approach prohibition largely mirrors a similar restriction enacted in 1987 for the protection of humpback whales in the Hawaiian Islands. Past experience in Hawaii suggests that this prohibition is easy to understand and enforce. Indeed, NOAA has successfully prosecuted many cases involving vessels that have violated this approach prohibition.

Additionally, from an enforcement perspective, this approach prohibition ensures more effective prosecution of inappropriate activities. The prohibition establishes a clear, objective, distance requirement. This requirement is easily understood by the vast majority of individuals who wish to legally observe right whales, and is far easier to prosecute in the event of a violation.

NMFS agrees with comments that stress the need for enforceable requirements. To that end, NMFS has made significant modifications from the proposed rule, especially to those provisions addressing right whale avoidance measures. NMFS has deleted provisions addressing head-on approaches and many of the speed and directional provisions applicable to aircraft and vessels within 500 yards (460 m) of a right whale. These changes are designed to simplify the requirements and enhance enforceability.

NMFS does not believe that these requirements are unduly burdensome. The rule provides an exception in instances where compliance would create an imminent and serious threat to any person, vessel, or aircraft. NMFS also recognizes that law enforcement activities are exempt from prohibitions such as this rule under traditional common law theories. Additionally, NMFS has the authority to consider

mitigating factors, such as the difficulty of compliance, in determining the appropriate enforcement response.

Finally, NMFS does not anticipate conflicts between this rule and regulations governing traffic separation schemes. Navigation rules provide for special exceptions in cases where departure from those rules is necessary to avoid immediate danger and, with respect to compliance with traffic separation schemes, in emergency circumstances. (See Rule 2 and Rule 10 of the COLREGS (See 33 CFR Part 81 App. A, Part A, Rule 2 and Part B, Section 1, Rule 10) and Rule 2 and 10 of the Inland Navigation Rules (33 U.S.C. 2002 and 2010)). In addition, this interim final rule provides for an emergency exception; NMFS recognizes that the applicability of this or other exceptions in this interim final rule must be evaluated in the context of the circumstances.

Comment 13: Reports of right whale sightings. One commenter notes that, although the proposed rule implies that vessel personnel are expected to report right whale sightings and locations, it contains no legal requirement for personnel to report.

Response: NMFS concurs. If a right whale is positively identified and observed, lookouts and/or vessel operators are encouraged to report right whale sightings and locations to the U.S. Coast Guard or other 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. Refer to the *Right Whale Avoidance Guidance* (see Summary of Protective Measures) for further information.

Comment 14: Authority citations. One commenter recommends that NMFS delete its reference to the Fish and Wildlife Act of 1956 in the proposed rule.

Response: The authority section for 50 CFR part 217, (this part is entitled "General Provisions" and includes a variety of definitions), currently includes the reference to the Fish and Wildlife Coordination Act. The approach regulations (except for the definitions) are issued under 50 CFR part 222, subpart D. The authority citation clearly indicates that those regulations are issued under the authority of the ESA and MMPA. The Fish and Wildlife Coordination is not cited as authority for that part or subpart of the CFR.

Comment 15: Vessel traffic coordination. Six commenters expressed support for the coordination

of whale alert teams in the southeast and northeast Atlantic set up to note whale locations and report them to the appropriate authorities, who then relay that information to ships in close range.

Response: NMFS concurs and notes that these efforts will increase public awareness and the effectiveness of this interim final rule. In coastal waters of the southeastern United States, an awareness and mitigation program, involving ten agencies and organizations, was begun in 1992, and has been upgraded and expanded annually. This effort includes an established Early Warning System network designed to prevent whale/vessel collisions on the calving grounds. NMFS also recently established an early warning network to alert mariners to the location of right whales off Massachusetts. This collaborated effort of the U.S. Coast Guard, the State of Massachusetts, the Center for Coastal Studies, the Stellwagen Bank National Marine Sanctuary and NMFS will make sighting information available through marine radio announcements, automated fax, and the Internet with the intention to reduce the chances of collisions between vessels and whales in New England waters.

Comment 16: Jurisdictional applicability. One commenter recommended clarification of the rule to indicate its applicability only to U.S. citizens and U.S.-flagged vessels, in order to be consistent with international law.

Response: Clearly this interim final rule applies to U.S. citizens and U.S.-flagged vessels. The prohibitions in the ESA generally apply to all persons subject to the jurisdiction of the United States, which includes foreign nationals and vessels in appropriate cases. With certain exceptions, the MMPA also prohibits any person, vessel or conveyance subject to the jurisdiction of the United States from taking a marine mammal on the high seas; any person, vessel or conveyance is prohibited from taking a marine mammal within the U.S. territorial sea or the exclusive economic zone (EEZ), except as expressly provided for by an international treaty, convention or agreement or associated implementing statute. NMFS disagrees that the applicability of the final rule to foreign vessels would necessarily conflict with international law. U.S. jurisdictional authority over vessels other than U.S.-flagged vessels depends upon the circumstances of each particular case. In all cases, however, the United States intends to enforce this rule consistently with international law, including customary international law

as reflected in the 1982 United Nations Convention on the Law of the Sea.

Comment 17: Territorial Sea. One commenter questioned the necessity of defining "territorial sea" for the proposed and final rules. In issuing the proposed rule, NMFS had set forth its view that the territorial sea jurisdiction under the ESA encompassed the area within 12 nautical miles (nm) (22.2 kilometers (km)) of the baseline. This commenter disagrees with NMFS defining the extent of the U.S. territorial sea as 12 nm (22.2 km) rather than 3 nm (5.6 km) seaward of the baseline on the grounds that Presidential Proclamation 5928 extended the U.S. territorial sea to 12 nm (22.2 km) for international but not for domestic, legal purposes. Also according to this commenter, the extent to which the term is being revised for the purposes of 50 CFR parts 216 to 227 is outside the scope of the rule and does not sufficiently provide for public notice and opportunity for comment.

Response: NMFS disagrees that the definition of "territorial sea," as presented in the proposed rule, is outside the scope of this rulemaking. NMFS also notes that to the extent that the definition would announce an interpretation of the ESA, there is no need for advance public notice or opportunity to comment. Finally, NMFS does not agree with the commenter's interpretation of the jurisdictional scope of the ESA and the effect of the Presidential Proclamation on that scope. Nonetheless, NMFS has decided not to issue a regulatory definition of the "territorial sea" in this interim final rule in order to have additional time to consult with other Federal agencies; this issue will be resolved prior to issuing a final rule.

Again, NMFS emphasizes that the restriction on approaches to right whales is promulgated under the authority of both the ESA and the MMPA. The MMPA defines "waters under the jurisdiction of the United States" to include both the territorial sea and the EEZ which extends 200 nm (370 km) beyond the baseline from which the territorial sea is measured. The ESA does not refer to the EEZ although persons subject to U.S. jurisdiction are prohibited from taking endangered species, both within the territorial sea and upon the high seas.

Summary of Protective Measures

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. This rule should be considered an important step towards that goal.

Description of the Interim Final Rule

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, this interim final rule is established: (1) To prohibit approach (including by interception) within 500 yards (460 m) of a right whale whether by vessel, aircraft or other means; and (2) to require adherence to right whale avoidance measures if a vessel or aircraft is within this restricted area.

Right whale avoidance measures are those actions necessary to be taken within 500 yards (460 m) of a right whale, as follows: (1) Vessels must steer a course away from the right whale and immediately leave the area at a slow constant speed (See *Right Whale Avoidance Guidance* for supplementary instruction); and (2) aircraft must take a course away from the right whale and immediately leave the area at a constant airspeed.

Exceptions to the interim final rule include: (1) Approaches to right whales that have been authorized by a NMFS permit (under subpart C (Endangered Fish or Wildlife Permits) or similar authorization); (2) situations of imminent and serious threat to the safety or life of a person, vessel or aircraft; (3) approaches made for the purpose of investigating a right whale entanglement or assisting in a right whale rescue or disentanglement, provided that prior permission is received from NMFS or a NMFS-designee; (4) aircraft operations, unless that aircraft is conducting whale watch activities; and (5) a vessel or aircraft restricted in its ability to maneuver and unable to comply with the right whale avoidance measures. Any person, who claims the benefit of any of the above exceptions has the burden to prove that the exception is applicable.

Right Whale Avoidance Guidance

As stated earlier in this preamble, NMFS wishes to provide guidance, separate and apart from the specific approach prohibitions and avoidance measures found in the regulations. This guidance is offered to assist individuals who find themselves in the vicinity of a right whale, with the aim of minimizing the possibility of interaction and the level of disturbance associated with any interaction. The guidelines are advisory only, and NMFS encourages individuals to follow them to the extent that doing so is consistent with the controlling, regulatory approach restrictions and avoidance measures.

Vessel lookout. Vessel operators are encouraged to maintain a proper lookout for right whales, especially when right whales are known to frequent an area. If a right whale is observed, increased vigilance is recommended, since other right whales also may be present in the area. Such vigilance is consistent with Rule 5 of the COLREGS (See 33 CFR Part 81 App. A, Part B, Section 1, Rule 5) and Rule 5 of the Inland Navigation Rules (33 U.S.C. 2005). Such vigilance may prevent inadvertent approaches as well as enable vessels to take all necessary avoidance measures.

If a right whale is positively identified and observed near a port, in a channel, in an established shipping lane, or in other areas with a high concentration of shipping activity, a vessel operator should report the sighting to the U. S. Coast Guard or other appropriate port authority, and request assistance if appropriate. 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 is encouraged to contact the U.S. Coast Guard or port authority for assistance or instruction.

Vessel speed. Vessel operators also are encouraged to proceed at prudent speed when transiting waters frequented by right whales. Prudence may require transit at a reduced speed in order to avoid approaching within 500 yards (460 m) of a right whale, or to enable vessels to follow any necessary avoidance measures. Such prudence is consistent with Rule 6 of the COLREGS and Rule 6 of the Inland Navigation Rules, which require vessels to proceed at a 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.

Sudden changes in operation. In order to minimize the potential for disturbance to a right whale, changes in vessel speed and direction should be gradual. To that end, rapid acceleration, use of bow thrusters, and sudden changes in propeller pitch are discouraged.

Head-on approaches. In order to minimize the risk of an unlawful approach, NMFS encourages vessel operators to avoid approaching a right whale head-on. Once a right whale is sighted, vessel operators should alter course to ensure that an approach within 500 yards (460 m) is avoided.

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 when this rule was proposed that this rule would not have a significant economic impact on a substantial number of small entities. NMFS received two comments, addressed above, concerning the economic impact of this rule. These comments did not cause the Assistant General Counsel to change his determination regarding the certification. Furthermore, the changes made from the proposed rule to the interim final rule do not affect the reasons for the certification. As a result, no regulatory flexibility analysis was prepared.

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

This interim final rule does not contain a collection-of-information requirement, subject to the Paperwork Reduction Act.

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: February 7, 1997.

Rolland A. Schmitten,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.

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

PART 217—GENERAL PROVISIONS

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

Authority: 16 U.S.C. 742a *et seq.*, 1361 *et seq.*, and 1531–1544, unless otherwise noted.

2. In § 217.12, the definitions of “Right whale,” “Underway,” “Vessel,” and “Vessel restricted in her ability to maneuver” are added in alphabetical order to read as follows:

§ 217.12 Definitions.

* * * * *

Right whale, as used in subpart D of this part, means any whale that is a member of the western North Atlantic population of the northern right whale species (*Eubalaena glacialis*).

* * * * *

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.

Vessel restricted in her ability to maneuver has the meaning specified for this term at 33 U.S.C. 2003(g).

* * * * *

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.*

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

§ 222.32 Approaching North Atlantic right whales.

(a) *Prohibitions.* Except as provided under paragraph (c) 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:

(1) Approach (including by interception) within 500 yards (460 m) of a right whale by vessel, aircraft, or any other means;

(2) Fail to undertake required right whale avoidance measures specified under paragraph (b) of this section.

(b) *Right whale avoidance measures.* Except as provided under paragraph (c) of this section, the following avoidance measures must be taken if within 500 yards (460 m) of a right whale:

(1) If underway, a vessel must steer a course away from the right whale and immediately leave the area at a slow safe speed;

(2) An aircraft must take a course away from the right whale and immediately leave the area at a constant airspeed.

(c) *Exceptions.* The following exceptions apply to this section, but any person who claims the applicability of an exception has the burden of proving that the exception is applicable:

(1) Paragraphs (a) and (b) of this section do not apply if a right whale approach is authorized by NMFS

through a permit issued under subpart C (Endangered Fish or Wildlife Permits) of this part or through a similar authorization.

(2) Paragraphs (a) and (b) of this section do not apply where compliance would create an imminent and serious threat to a person, vessel, or aircraft.

(3) Paragraphs (a) and (b) of this section do not apply when approaching to investigate a right whale entanglement or injury, or to assist in the disentanglement or rescue of a right whale, provided that permission is received from NMFS or a NMFS designee prior to the approach.

(4) Paragraphs (a) and (b) of this section do not apply to an aircraft unless the aircraft is conducting whale watch activities or is being operated for that purpose.

(5) Paragraph (b) of this section does not apply to the extent that a vessel is restricted in her ability to maneuver, and because of the restriction, cannot comply with paragraph (b) of this section.

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