

\* \* \* \* \*

(h) *Crustaceans.*

**Kauai Cave Amphipod (*Spelaeorchestia koloana*)**

The critical habitat designation and the primary constituent elements for the Kauai cave amphipod are exactly the same as those of the Kauai cave wolf spider. See the entry in paragraph (g) of this section for the Kauai cave wolf spider. All critical habitat areas contain one or more of the primary constituent elements for the Kauai cave amphipod.

\* \* \* \* \*

Dated: March 12, 2002.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 001128334-2048-07; I.D. 021202A]

RIN 0648-AN88

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

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS is proposing to amend the regulations that implement the Atlantic Large Whale Take Reduction Plan (ALWTRP), specifically with regard to the straight set of gillnets in the Southeast U.S. Restricted Area in waters off the coasts of Georgia and Florida. The intent of this proposed rule is to prohibit straight sets of gillnets at night from November 15 through March 31, annually, to reduce the risk of entanglement of large whales, including the western North Atlantic right whale. NMFS is also announcing the availability of an Environmental Assessment (EA) and a Regulatory Impact Review (RIR).

**DATES:** Comments on the proposed prohibition of the straight set of gillnets must be postmarked or transmitted via facsimile by 5 p.m. Eastern Standard Time, on May 28, 2002. Comments

transmitted via e-mail will not be accepted.

**ADDRESSES:** Send comments on this proposed rule to the Chief, Protected Resources Division, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702-2432.

Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, progress reports on implementation of the ALWTRP, and a table of the changes to the ALWTRP may be obtained by writing to Diane Borggaard, NMFS/Northeast Region, 1 Blackburn Dr., Gloucester, MA 01930 or Katie Moore, NMFS/Southeast Region, 9721 Executive Center Dr., St. Petersburg, FL 33702-2432.

**FOR FURTHER INFORMATION CONTACT:**

Katie Moore, NMFS, Southeast Region, 727-570-5312; Diane Borggaard, NMFS, Northeast Region, 978-281-9145; or Patricia Lawson, NMFS, Office of Protected Resources, 301-713-2322.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

Copies of the EA and RIR can be obtained from the ALWTRP Web site: <http://www.nero.nmfs.gov/whaletrp/>.

**Background**

The ALWTRP was developed pursuant to the Marine Mammal Protection Act (MMPA) to reduce the level of serious injury and mortality of whales by Atlantic lobster trap and gillnet fisheries. The background for the take reduction planning process and development of the ALWTRP is set out in the preamble to the proposed (62 FR 16519, April 7, 1997), interim final (62 FR 39157, July 22, 1997), final (64 FR 7529, February 16, 1999), interim final (65 FR 80368, December 21, 2000), interim final (67 FR 1142, January 9, 2002), final (67 FR 1133, January 9, 2002), and final (67 FR 1300, January 10, 2002) rules implementing the ALWTRP. Copies of these documents and supporting EAs are available from the contacts noted in the **ADDRESSES** section of this proposed rule.

NMFS issued four biological opinions (BOs) on the multispecies, spiny dogfish, monkfish, and lobster fisheries on June 14, 2001, in accordance with section 7 of the Endangered Species Act (ESA). The BOs concluded that all four of the fisheries jeopardized the continued existence of the western North Atlantic right whale. The reasonable and prudent alternative (RPA) in the June 14, 2001, BOs included additional gear modifications for the northeast lobster trap fisheries and new gear modifications for the mid-Atlantic and southeast gillnet fisheries

that are necessary to avoid jeopardizing the continued existence of western North Atlantic right whales. Southeast gillnet gear restrictions identified in this proposed rule address the RPA in an effort to reduce potential entanglements of western North Atlantic right whales.

#### **Take Reduction Planning Activities in 2000 and 2001**

Pursuant to section 118 (f)(7)(E) and (F) of the MMPA, NMFS has reconvened the ALWTRT periodically to monitor progress of the ALWTRP and to make recommendations for improvements. During the February 2000 meeting, the ALWTRT split into sub-groups covering the northeast, mid-Atlantic, and southeast areas. The recommendations of the northeast sub-group were addressed by the December 2000 interim final rule. The mid-Atlantic and southeast sub-groups met on August 25, 2000, and July 24, 2000, respectively, and provided meeting summaries with recommendations to the entire ALWTRT for review.

The ALWTRT met as a whole on June 27 and 28, 2001, to review the elements of the RPA required by the four BOs and recommend measures that would not only satisfy the requirements of the ESA and the four BOs, but would also satisfy the requirements of the MMPA. The MMPA provides the goals of reducing takes in commercial fishing operations to below the potential biological removal (PBR) level within 6 months of the ALWTRP's implementation and the achievement of a zero mortality rate within 5 years of ALWTRP implementation. For western North Atlantic right whales, these two goals are essentially the same since the PBR level is defined as zero. Consequently, the ALWTRT concurred that additional entanglement risk reduction is needed to comply with the MMPA.

NMFS published a proposed rule on October 1, 2001 (66 FR 49896), and final rule on January 10, 2002 (67 FR 1300), to amend the ALWTRP per the RPA and the Atlantic Large Whale Take Reduction Team's recommendations. The rule included provisions such as requiring weak links, temporal anchoring, and line diameter restrictions. The proposed rule also included provisions addressing the straight set of gillnets in the Southeast U.S. Restricted Area at night. Though NMFS prepared a thorough analysis of the straight set provision to include in the proposed rule's EA, NMFS accidentally left out the analysis in the EA. In order to ensure that the public had sufficient information to review and analyze the straight set provision in the proposed rule, NMFS removed the

straight set provision from the January 10, 2002, final rule. NMFS is issuing this proposed rule to provide the public adequate time to review and comment on the measure and the EA. The EA and RIR regarding the straight set provision are now available for public review, and NMFS is seeking public comments.

#### **Changes Proposed for the ALWTRP for Gillnet Gear**

Regulatory measures discussed by the southeast sub-group included applying northeast gear marking requirements to the southeast area and a restriction on gear deployment methods for non-shark gillnets during the western North Atlantic right whale calving season. The October 1, 2001, proposed rule discussed NMFS' decision to leave the existing gear marking requirement in place for the Southeast U.S. Restricted Area. Additional gillnet restrictions discussed but not adopted by the sub-group included time-area management, net modifications (e.g., weak links), and seasonal restrictions. In the development of the proposed rule, NMFS excluded these preliminary alternatives and several others from detailed analysis, because the alternatives were not considered to be within the scope of the action,

technically feasible, or recommended by the ALWTRT.

The gillnet restriction recommended by the southeast sub-group was the prohibition of straight sets of gillnets at night from November 15 through March 31, annually, in the Southeast U.S. Restricted Area, (i.e., unless the exemption under 50 CFR 229.32 (f)(3)(iii), which relates to shark gillnets, applies). The Southeast U.S. Restricted Area consists of those waters from 27° 51' N lat. (near Sebastian Inlet, FL) to 32° 00' N lat. (near Savannah, Georgia) extending from the shore outward to 80° W long. Night means any time between one-half hour before sunset and one-half hour after sunrise, as per the ALWTRP (50 CFR 229.2).

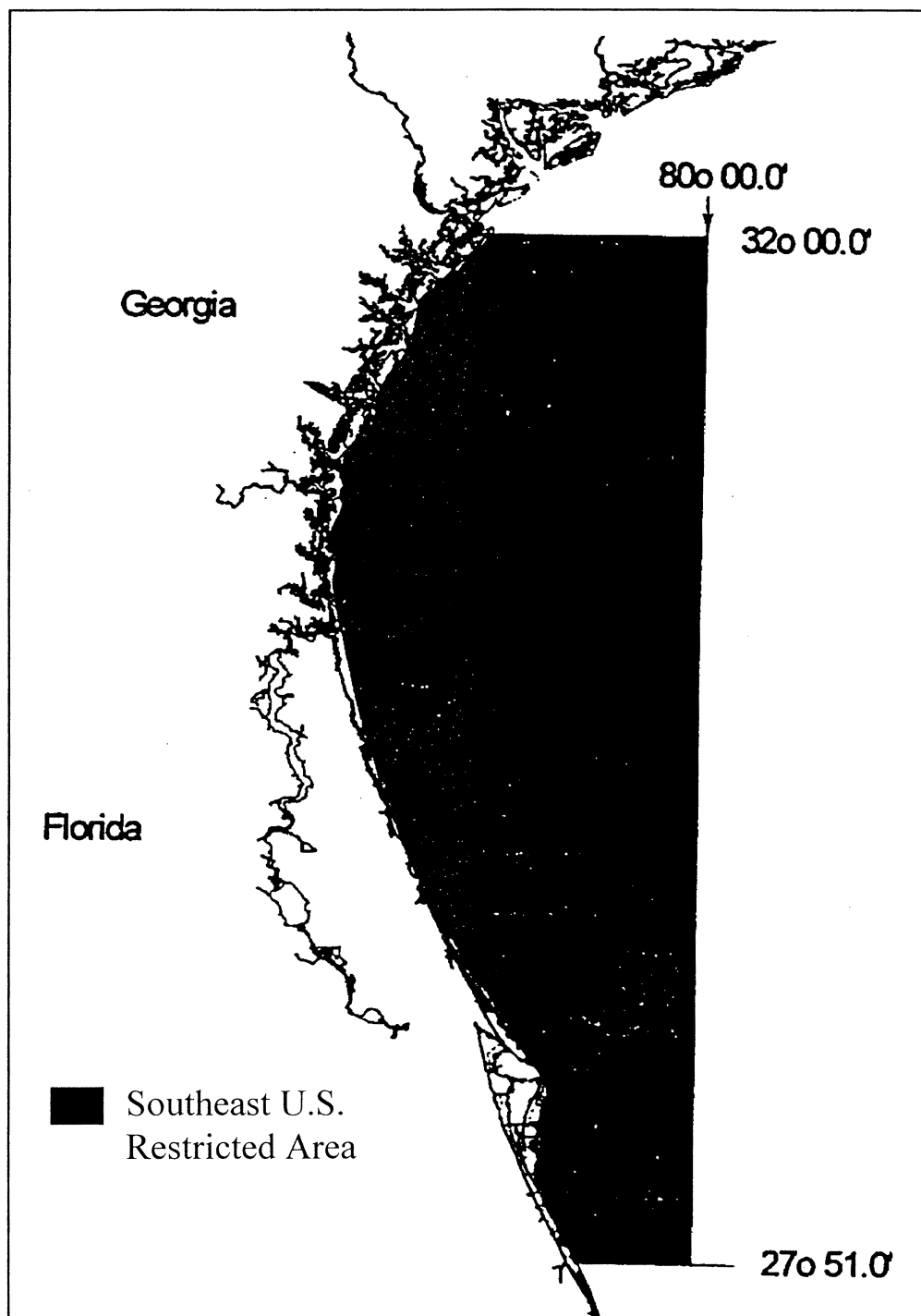
A straight set is the deployment of a gillnet in a straight line, as opposed to the deployment of a gillnet in a circular manner, for example, around a school of fish. Both deployment types are currently fished in the proposed management area, the U.S. Restricted Area, which includes a nursery area for mothers and calves. Right whales generally occur in this area from November 15 through March 31. A prohibition during that time-area of the gear types with which the right whale is known to have become entangled

would afford additional protection to the concentrations of western North Atlantic right whales. NMFS believes that straight set gillnets deployed during daytime are of very minimal threat to whales. Such gear is retrieved within about one-half hour of every set, and thus the fisher would be on-site in the possible event of an entanglement. Straight sets at night pose a higher level of risk of entanglement to whales than strike sets or straight sets during the day, because fishers are not as actively involved with straight set gear (in comparison to the strike set method used in southeast Atlantic waters), and whales are much more difficult to spot at night due to darkness. Through the proposed rule, NMFS aims to reduce the potential for the entanglement of western North Atlantic right whales in straight set gillnet gear. Due to the gear restrictions, the proposed rule will reduce the likelihood of effort influx into the fishery in the future, thereby further reducing the potential likelihood of entanglements.

Figure 1 shows the boundaries for the Southeast U.S. Restricted Area. Currently the shark gillnet fishery is regulated using these boundaries (50 CFR 229.32 (f)(1)).

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Figure 1



November 15 to March 31 Straight Set Gillnet Restrictions

## Classification

This proposed rule does not include a collection-of-information requirement subject to the Paperwork Reduction Act.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The basis for this certification follows:

The MMPA provides the statutory basis for the rule. The proposed rule would prohibit the use of straight set gillnets in the Southeast U.S. Restricted Area at night from November 15 through March 31, annually, unless the fishing activity was exempted under 50 CFR 229.32 (f)(3)(iii), which pertains to restrictions on shark gillnet fishing.

The objective of the proposed rule is to eliminate serious injuries or mortalities of western North Atlantic right whales attributable to entanglements with fishing gear and incorporates the time and area during which right whale calves are born.

Available data do not demonstrate that the fishing behavior or methodology restricted by the proposed rule is utilized to a great extent in the restricted area. Virtually all recorded gillnet harvests from this area and season are attributed to runaround gillnets and not straight set gillnets. Less than \$133 per year of gross revenues in total can potentially be attributed to the use of straight set gillnets. Further, data on average trip times, soak times, and vessel characteristics indicate that the fishery is primarily prosecuted as a day fishery. Therefore, any direct economic impacts on the fishery will be minimal since the fishery does not substantially operate in the manner being restricted.

Generally, a fish-harvesting business is considered a small business if it is independently owned and operated, not dominant in its field of operation, and has annual receipts not in excess of \$3.5 million. One hundred two unique entities (vessels or persons) have reported landings in this fishery over the 1997-2000 fishing seasons. Total dockside value of commercial harvests by these entities from all fishing activities and all gears averaged from \$16,000 to \$24,000 per year over this period. The maximum gross revenues were less than \$300,000. All operations would be considered small business entities. Thus, business operations in this fishery consist solely of small business entities.

The determination of significant economic impact can be ascertained by examining two criteria:

disproportionality and profitability. The disproportionality question is: Do the regulations place a substantial number of small entities at a significant competitive disadvantage to large entities? All business entities participating in the respective area of the south Atlantic gillnet fishery are considered small business entities. Thus, the issue of disproportionality does not arise in the present case.

The profitability question is: Do the regulations significantly reduce profit for a substantial number of small entities? The predominant harvest methodology in this fishery is runaround (i.e., strike) gillnets and day trips and not the methodology restricted by the proposed rule. Less than \$500, or \$133 per year, of reported landings from all participants over the 1997-2000 fishing seasons is potentially attributable to straight set gillnets. Participation ranged from 41 to 62 vessels during this period, for an average of less than \$4 per vessel. Whether spread over multiple participants or attributed to a single vessel, it is clear that restricting the use of this gear will not significantly reduce profits for a substantial number of small entities. On this basis, the proposed rule may be adjudged not to have a significant economic impact on a substantial number of small entities.

Accordingly, an initial regulatory flexibility analysis was not prepared. Copies of the RIR are available (see ADDRESSES).

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

## List of Subjects in 50 CFR Part 229

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

Dated: March 19, 2002.

**Rebecca Lent**

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

For the reasons set out in the preamble, the National Marine Fisheries Service proposes to amend 50 CFR part 229 as follows:

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

1. The authority citation for part 229 continues to read as follows:

**Authority:** 16 U.S.C. 1371 *et seq.*

2. In § 229.3, paragraph (k) is revised to read as follows:

## § 229.3 Prohibitions.

\* \* \* \* \*

(k) It is prohibited to fish with gillnet gear in the areas and for the times specified in § 229.32(f)(1) through (f)(4), unless the gear or the person with gillnet gear complies with the gear marking requirements specified in § 229.32(f)(2), the requirements for observer coverage as specified in § 229.32(f)(3), and the closures, requirements, and other restrictions as specified in 229.32(f)(4).

\* \* \* \* \*

3. In § 229.32, the heading of paragraph (f) and paragraph (f)(3) are revised; and paragraph (f)(4) is added to read as follows:

## § 229.32 Atlantic large whale take reduction plan regulations.

\* \* \* \* \*

(f) *Restrictions applicable to the Southeast U.S. Restricted Area and the Southeast U.S. Observer Area.* \* \* \*

\* \* \* \* \*

(3) *Observer requirement.* No person may fish with shark gillnet gear in the southeast U.S. observer area from November 15 through March 31 of the following year unless the operator of the vessel calls the SE Regional Office in St. Petersburg, FL, not less than 48 hours prior to departing on any fishing trip in order to arrange for observer coverage. If the Regional Office requests that an observer be taken on board a vessel during a fishing trip at any time from November 15 through March 31 of the following year, no person may fish with shark gillnet gear aboard that vessel in the southeast U.S. observer area unless an observer is on board that vessel during the trip.

(4) *Restricted Period, closure and restrictions, and exemption.*

(i) *Restricted period.* The restricted period for the southeast U.S. restricted area is from November 15 through March 31 of the following year, unless the Assistant Administrator revises this restricted period in accordance with paragraph (g) of this section.

(ii) *Closure for shark gillnet gear.* Except as provided under paragraph (f)(4)(iv) of this section, no person may fish with shark gillnet gear in the southeast U.S. restricted area during the restricted period.

(iii) *Restrictions for straight sets.* Except as provided for shark gillnet gear under paragraph (f)(4)(iv) of this section, no person may fish with a straight set of gillnet gear at night in the southeast U.S. restricted area during the restricted period. A straight set is defined as a set in which the gillnet is placed in a line in the water column, as

opposed to a circular set in which the gillnet is placed to encircle an area in the water column.

(iv) *Special provision for strikenets.*Fishing for sharks with strikenet gear is exempt from the restrictions under paragraphs (f)(4)(ii) and (f)(4)(iii) of this section if:

(A) No nets are set at night or when visibility is less than 500 yards (460m).

(B) Each set is made under the observation of a spotter plane.

(C) No net is set within 3 nautical miles of a right, humpback, fin or minke whale.

(D) If a right, humpback, fin or minke whale moves within 3 nautical miles of the set gear, the gear is removed immediately from the water.

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