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An appropriate amendment to 39 CFR Part 111 will be published if the proposal is adopted.

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Chief Counsel, Legislative.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 021108270-3204-02; I.D. 102802C]

RIN 0648-AQ53

Endangered and Threatened Species; Finding for a Petition to Revise Critical Habitat for Northern Right Whales

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

ACTION: Response to petition; final determination.

SUMMARY: On July 11, 2002, NMFS received a petition dated July 7, 2002, requesting that NMFS revise the present critical habitat designation for the western North Atlantic right whale, *Eubalaena glacialis*, (right whales) under the Endangered Species Act (ESA) by combining and expanding the current Cape Cod Bay and Great South Channel critical habitats in the Northeast and by expanding the current critical habitat in the Southeast. NMFS has determined that the requested revision, as specified by the petitioner, is not warranted at this time. However, NMFS will continue to analyze the physical and biological habitat features essential to the conservation of right whales.

ADDRESSES: Comments and requests for copies of this determination should be addressed to Assistant Regional Administrator for Protected Resources, Protected Resources Division, NMFS, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Brian Hopper, Northeast Region, telephone (978) 281-9328 x6509, fax (978) 281-9394; Barb Zoodsma, Southeast Region, telephone 904-321-2806, fax (904) 321-1579; or Kristy Long, telephone (301) 713-1401, fax (301) 713-0376.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several background documents on right whales and the critical habitat designation process can be downloaded from the NOAA Fisheries Web Site at <http://www.nmfs.noaa.gov/>.

Background

Right whales in the North Atlantic are one of three populations of endangered right whales worldwide. The other populations occur in the North Pacific and the Southern Hemisphere. The southern right whale is recognized as a separate species and, until recently, the North Atlantic and North Pacific stocks were defined as a single species. However, recent genetic studies provided evidence that supported separating species status for these two populations, one in the North Atlantic and another in the North Pacific. On April 10, 2003, NMFS published a final rule (68 FR 17560) concerning the nomenclature and taxonomy of right whales, which formally acknowledges these scientific findings by changing the species name of the northern right whale as follows: the North Atlantic right whale, *Eubalaena glacialis*, and the North Pacific right whale, *Eubalaena japonica*. These technical changes did not affect the listing status of these species under the ESA (all three remain "endangered").

Status of North Atlantic Right Whale

The North Atlantic right whale is one of the world's most critically endangered species of large whale (Clapham *et al.* 1999). Despite nearly three-quarters of a century of international legal protection, the right whale has not shown any recovery towards its pre-exploitation numbers. Recent studies on the current population trend in right whales suggest that, if the population decline is not reversed, the species is likely to become extinct in less than 200 years (Caswell *et al.* 1999). More than 800 years of uncontrolled and intense hunting is the primary reason that the right whale population has declined to such a precarious level. Today, ship strikes and entanglements in fishing gear are the primary, human-related causes of serious injury and mortality to right whales that impede the species' recovery.

Exploitation: North Atlantic right whales were the first target of commercial whaling and, consequently, the first large whale species to be hunted to near extinction by such efforts. Several characteristics specifically attributable to the right whale made it a highly desirable

resource, such as its large yield of commercially valuable products (e.g., oil and baleen), its slow swimming speed, its distinction of floating when dead, and its generally coastal distribution. These factors also contributed to the whale's common name, which is said to have originated from the English whalers who designated this species of whale as the "right" (i.e., correct) whale to hunt.

The commercial harvest of right whales began with Basque whalers taking substantial numbers of them as early as the 1500s in the Strait of Belle Isle region (Aguilar, 1986). As the stocks in the eastern North Atlantic became depleted, hunting effort shifted to the western North Atlantic, off the Labrador and New England coasts. This intense period of early whaling may have resulted in a significant reduction in the stock of right whales by the time colonists in the Plymouth area began hunting for right whales in the 1600s (Reeves and Mitchell, 1987). A modest but persistent whaling effort along the coast of the eastern United States lasted three centuries, and the records include one report of 29 whales killed in Cape Cod Bay in a single day during January 1700. The right whales' vulnerability to over-exploitation was noticed as early as the 19th century. For example, in 1851, Herman Melville wrote that, although still numerous at that time, the right whale could vanish from the earth under the hunting pressure then being applied to the species. However, Melville's prophetic observation went largely ignored for over 80 years, and the traditional high-seas Yankee whale fishery made way for a modern, industrial, and efficient whaling fleet. Finally, in 1935, the species had declined to such low levels that the League of Nations was able to get most whaling nations to agree to stop hunting right whales.

Abundance and Trends: An estimate of the pre-exploitation population size of right whales is not available. However, based on historical catch levels, right whale abundance probably exceeded 10,000 animals. The historic range of North Atlantic right whales extended from as far south as Florida and northwestern Africa to as far north as Labrador, southern Greenland, Iceland, and Norway (Kenney, 2002). Commercial whaling severely depleted the population to the point where right whales are no longer abundant in portions of their historical range (e.g., the Strait of Belle Isle, Newfoundland, the coastal waters of Long Island, New York, and Delaware Bay). Therefore, the present range of North Atlantic right whales, from Florida to Nova Scotia, is

considerably reduced from its historic extent.

The best estimate of present abundance is about 300 animals. In 1998, the right whale population size was estimated to be 291 individuals (Kraus *et al.*, 2001) based on a census of individual whales identified using photo-identification techniques. It is assumed that the census of identified and presumed living whales represents a minimum population size estimate. However, the true population size in 1998 may have been higher if: (1) there were animals not photographed and identified; and/or (2) some animals presumed to be dead, actually, were not.

The population growth rate reported for the period 1986–1992 by Knowlton *et al.* (1994) was 2.5 percent (CV=0.12), which suggested that the species was showing signs of a slow recovery. However, more recent work by Caswell *et al.* (1999) has suggested that crude survival probability declined from about 0.99 in the early 1980s to about 0.94 in the late 1990s. The decline in survival probability is statistically significant. Additional work conducted in 1999 concluded that survival had indeed declined during the 1990s (Best *et al.*, 2001). Although heterogeneity of capture could negatively bias survival estimates, subsequent review of this study concluded that this factor could not account for all of the observed decline, which appeared to be particularly marked in adult females.

Seasonal Movement and Habitat:

Right whales migrate annually between high-latitude feeding grounds and low-latitude calving and breeding grounds. In general, most of the whales spend the spring and early summer off the coast of New England, then, in the latter part of the summer and fall, move to the waters off southern Canada. Some whales may remain in these northern waters throughout the winter, but the majority leave. Therefore, the exact location of a large segment of the population is unknown during the winter. A small fraction of the population, consisting almost entirely of pregnant females and juveniles, migrates south in the winter to the only known calving ground for the species - the coastal waters of Georgia and northeast Florida.

Breeding and Calving: The precise location of a breeding ground for right whales has not been identified. However, as North Atlantic right whales have been observed engaging in breeding-like behavior throughout much of their range, the concept of a specific breeding ground may not be relevant for this species.

The only known current calving ground in the western North Atlantic is

in the coastal waters of the southeastern United States, especially the shallow waters from Savannah, Georgia, south to Cape Canaveral, Florida. It has been speculated that other coastal areas, such as Delaware Bay and Cape Cod Bay, may have been calving grounds before the population was decimated by whaling (Kenney, 2002).

Prey: Right whales feed exclusively on zooplankton, especially on large calanoid copepods (mostly of the genera *Calanus* and *Pseudocalanus*). At times, they also feed on juvenile euphausiids (also known as krill), smaller copepods, pteropods (tiny planktonic snails), or the planktonic larval stages of barnacles and other crustaceans (Kenney, 2002).

The waters along the New England coast are a primary feeding habitat for the right whale. Research suggests that right whales must locate and exploit extremely dense patches of zooplankton to feed efficiently (Mayo and Marx, 1990). These dense zooplankton patches are known to occur in the spring, summer, and fall right whale habitats from Cape Cod Bay to the Bay of Fundy.

Status of North Atlantic Right Whales Under the Endangered Species Act

The right whale was listed as endangered under the Endangered Species Conservation Act, the precursor to the ESA, on June 2, 1970 (35 FR 8495; codified at 50 CFR 17.11). The species was subsequently listed as endangered under the ESA in 1973, and as depleted under the Marine Mammal Protection Act in the same year. NMFS has the lead responsibility for developing, implementing, and monitoring a recovery program for this species.

NMFS published a Final Recovery Plan for the Northern Right Whale (Recovery Plan) in 1991, and a draft, revised Recovery Plan in 2001. Habitat related objectives were identified in the 1991 Recovery Plan, as well as in the 2001 draft revision. One of these objectives was to characterize known habitats of special importance to the species, identify other habitats essential to the conservation of the species, and protect these areas as necessary. Additional objectives of the Recovery Plan concerning habitat include the collection of new data and analysis of available data to assess the need for expanding or modifying the existing critical habitat boundaries.

NMFS was petitioned by the Right Whale Recovery Team to designate critical habitat for right whales on May 18, 1990. A notice was published in the **Federal Register** on July 12, 1990 (55 FR 28670), requesting information and comments on the petition. The proposed critical habitat designation was

published on May 19, 1993 (58 FR 29186), and the final rule was published on June 3, 1994 (59 FR 28793; codified at 50 CFR 226.203). Areas included in the initial critical habitat designation were identified primarily on the basis of use by right whales. The designation recognized and discussed important characteristics of these habitats that relate to aspects of right whale biology, such as foraging, calving, and nursing. Specifically, this designation includes portions of Cape Cod Bay and Stellwagen Bank, the Great South Channel (each off the coast of Massachusetts), and waters adjacent to the coasts of Georgia and the east coast of Florida.

Petition To Revise Existing Right Whale Critical Habitat

On July 11, 2002, NMFS received a petition dated July 9, 2002, from The Ocean Conservancy requesting that NMFS revise the current critical habitat designation for North Atlantic right whales by expanding its boundaries in both the Northeast and Southeast U.S. The petitioner requests that NMFS expand the existing Southeast critical habitat designation to the following coordinates: 31° 30' N to 29° 40' N from the shoreline out to thirty nautical miles; 29° 40' N to 28° 00' N from the shoreline out to ten nautical miles. The petitioned area would add approximately 2,700 nm² (5,003.6 km²) to the current critical habitat coverage. The petitioner also requests that NMFS expand and combine both the existing Northeast critical habitat designations (Cape Cod Bay and Great South Channel) into one critical habitat area bounded by the following coordinates: 41° 41.2' N/69° 58.2' W; 41° 00.0' N/69° 05.0' W; 41° 00.0' N/68° 13.0' W; 42° 12.0' N/68° 13.0' W; 42° 12.0' N/70° 30.0' W; 41° 46.8' N/70° 30.0' W; and on the southwest corner by the shoreline of Cape Cod, MA.

The petitioner states that 10 years of new data regarding right whale distribution and causes of mortality along the east coast of the United States show that the current critical habitat designation is not sufficient to protect right whales from further anthropogenic mortality. According to the petitioner, the additional critical habitat contains several features essential to the conservation of the right whale in the western North Atlantic that may require specific protection or management considerations to ensure the survival and recovery of the species. The petitioner stated that the areas petitioned for expanded critical habitat experience high levels of human disturbance in the form of shipping

activities, fisheries, military activities, dredging operations, increased pollution, and general habitat disturbance. The essential features associated with the petitioned critical habitat according to the petitioner include the following: space for individual and population growth and for normal behavior; food, water, air, light, minerals or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of species.

The petitioner acknowledged that some areas in the northeastern U.S. have already received special management attention in the form of fishing regulations, but maintains that essential right whale habitat along the eastern seaboard lacks protection from ship strikes. In addition, the petitioner noted that when several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

The petitioner stated that the continued high mortality of North Atlantic right whales from ship strikes indicates the immediate need for management actions to reduce ship strikes, maintaining that accurately designated critical habitat boundaries will facilitate the management process. In addition, the petitioner stated that since the time critical habitat was originally designated in the southeastern U.S., extensive and expansive survey efforts have shown that right whales occur further offshore than originally known. The petitioner contended that the importance of this area as the only known calving ground for right whales warrants the revision of critical habitat to protect the animals within this region.

Section 4(b)(3)(D) of the ESA requires that NMFS, to the maximum extent practicable, within 90 days after receiving a petition to revise existing critical habitat, make a finding as to whether the petition presents substantial scientific information indicating that the petitioned action may be warranted and publish the finding in the **Federal Register**. If the finding is that substantial scientific information is presented, NMFS is required, within 12 months of the date the petition was received, to make a determination on how it intends to proceed with the requested revision and promptly publish notice of such intention in the **Federal Register**.

On November 19, 2002 (67 FR 69708), NMFS published a notice finding that the subject petition contained substantial scientific information indicating that the requested revision of right whale critical habitat may be warranted and inviting interested persons to submit comments and information concerning revision. NMFS' finding was based on the agency's concurrence with petitioner's statement that extensive and expanded survey efforts in the southeast indicate that right whales occur farther offshore than previously known, and that the draft final recovery plan suggested that data should be analyzed to assess expanding or modifying the critical habitat boundaries.

Response to the Comments Received on the Petition

NMFS received over 2,000 letters and postcards during the comment period. The comments are addressed in the following paragraphs.

Comments in Support of Revising Critical Habitat

Comment 1: Hundreds of people sent form letters and post cards expressing support for the proposed expansion of right whale critical habitat, based on the belief that it will more accurately reflect the distribution and range of the species and provide a mechanism to achieve greater protection. Another commenter suggested that NMFS designate the entire known range of North Atlantic right whales as critical habitat.

Response: Recent NMFS surveys have documented the consistent use of areas outside of the currently designated critical habitats by right whales (Zoodsma et al., 1999; Merrick et al., 2001). However, more analyses of the sightings data and their environmental correlates are necessary to define and designate these areas as critical habitat. Furthermore, the ESA requires that the process for designating critical habitat must focus on the identification of specific habitat features (i.e., primary constituent elements) essential to right whale conservation that may require special management considerations or protection, rather than only on known distribution. If the physical and biological features essential to the conservation of right whales are identified and determined to be distributed outside of current critical habitat boundaries, NMFS will evaluate the addition of areas containing these features to the designated critical habitat, in accordance with the requirements set forth in sections 3(5)(A) and 4(b)(2) of the ESA.

Comment 2: Two commenters recommended that NMFS review the available data and, based on that review, expand the current critical habitat as warranted. In addition, these commenters recommended that NMFS contract or prepare a report similar to the one prepared for the Marine Mammal Commission in 1991, which assesses right whale sighting data and human activities in and around the three existing right whale critical habitat areas. Such a report could be used to identify and evaluate the most appropriate critical habitat boundaries.

Response: NMFS agrees that the available data should be reviewed and, based on that review, NMFS could proceed to revise critical habitat. NMFS intends to proceed with the analyses necessary to evaluate the necessity of revising critical habitat based on the need to protect the habitat features essential to the conservation of right whales. Finally, NMFS will consider the recommendation to solicit a contractor to prepare a report that assesses right whale sighting data and human activities in and around the three existing right whale critical habitat areas.

Comment 3: In addition to supporting the proposed expansion of critical habitat, several commenters suggested that NMFS include other areas shown to be regularly frequented by right whales that are outside of the petitioned area. For example, these commenters specifically suggested including Jeffreys Ledge, Platts Bank, Fippennies Ledge, and Cashes Ledge because of their seasonal use as feeding habitat. Furthermore, these commenters suggested that the Seasonal Area Management (SAM) areas northeast of the Great South Channel should receive equal consideration as critical habitat.

Response: See response to Comment 1.

Comment 4: With respect to the petitioned revision in the Southeast, one commenter expressed support for the need to expand critical habitat beyond the current boundaries because recent surveys have shown regular and significant numbers of right whales in these waters.

Response: See response to Comment 1.

Comments Opposed To Revising Critical Habitat

Comment 5: Several commenters expressed support for federal efforts to protect and recover right whales, including the concept of expanding critical habitat based on the availability of new data, but did not support the petitioned revision because the

information provided by the petitioner is insufficient. Therefore, these commenters suggest that NMFS conduct further analysis and research on right whale distribution, including the identification of "high-risk" areas. Specifically, these commenters recommend an analysis of all right whale sightings since 1994 using a Sightings-Per-Unit-Effort analysis, which will provide scientists and managers with a more precise representation of spatial and temporal patterns of right whale habitat use.

Response: NMFS agrees that further analysis of the available data is warranted to better understand what areas are most frequented by right whales so that we may better manage the threat of takes. In addition, more analyses of the sightings data and their environmental correlates are necessary to define and designate additional areas as critical habitat. NMFS notes, however, that any revision of critical habitat will reflect habitat features essential to conserving the North Atlantic right whale population.

Comment 6: One commenter expressed concern that a revised and expanded critical habitat would unnecessarily restrict military training/operations in additional open ocean areas.

Response: As Federal agencies, under section 7 of the ESA, the branches of the U.S. military are required to consult with NMFS (or U.S. Fish and Wildlife Service) to ensure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. NMFS does not agree that it is a forgone conclusion that the revision of critical habitat will restrict military operations along the East Coast. A designation or revision of critical habitat assists Federal agencies in planning future actions, since the designation or revision identifies, in advance, those habitat features that will be given special consideration through section 7 consultations. Therefore, potential conflicts between projects and endangered species can be identified early in the planning process.

Comment 7: One commenter expressed opposition to the petitioned revision to critical habitat because he/she believes it is unnecessary and would only lead to more petitions to designate critical habitat until the entire Atlantic Ocean is critical habitat.

Response: The public's right to petition NMFS to designate or revise critical habitat is expressly provided for in the ESA, and the agency can neither prohibit the exercise of this right nor

ignore the petitions it receives with respect to such actions. In addition, the regulations at 50 CFR 424.12(g) provide NMFS with the authority to revise existing critical habitat when new data become available. As explained later on in this Notice, NMFS believes that the requested revision of critical habitat, as specified by the petitioner, is not warranted at this time. However, NMFS intends to proceed with the specified activities to determine whether a revision of critical habitat is warranted.

Comment 8: One commenter expressed the belief that a revised critical habitat designation would not be an effective mechanism for reducing the levels of right whale mortalities. In light of the commenter's belief that there is no link between the extent of critical habitat boundaries and levels of anthropogenic mortality, this commenter suggests that NMFS take immediate action to require universal gear modifications as the most effective means for enhancing the protection of right whales.

Response: The revision of critical habitat would likely not directly address the "take" issue to which this comment refers. The designation of critical habitat, in itself, does not necessarily lead to additional management measures. Under the ESA, the only direct impact of a critical habitat designation is through the provisions of section 7. Section 7 applies only to actions with Federal involvement (e.g., authorized, funded, conducted), and, through the consultation process, requires modifications to those projects that would result in the destruction or adverse modification of the primary constituent elements in designated critical habitat areas. Accordingly, NMFS would address the need for management measures for commercial fishing in critical habitat through the ESAs section 7 consultations on the fisheries regulated by NMFS and the Atlantic Large Whale Take Reduction Plan (ALWTRP). Indirectly, critical habitat designations also help focus Federal, state, and private conservation and management efforts in those areas. Recovery efforts may address special considerations needed in critical habitat, including conservation regulations to restrict private as well as Federal activities. Finally, it is important to note that the recommendation for special gear modifications designed to reduce serious injury to or mortality of right whales is more appropriate within the context of NMFS' Atlantic Large Whale Take Reduction Team (ALWTRT) than in the context of a petition to revise critical habitat.

Comment 9: Three commenters expressed opposition to the proposed expansion of critical habitat because it would lead to further regulation of state fisheries while continuing to bypass the shipping industry. In addition, these commenters urged NMFS to implement rules that would specifically protect right whales from ship strikes.

Response: First, the designation or revision of critical habitat does not, in itself, restrict non-Federal activities within the area or mandate any specific management or recovery action; as discussed above, a designation of critical habitat triggers an inter-agency consultation requirement designed to ensure that Federal activities avoid destruction or adverse modification of critical habitat. In addition, a critical habitat designation or revision contributes to the conservation of a species by identifying the physical and biological features within those areas that are essential to conservation of the species, thereby alerting both public and private entities to the importance of the area to the species. Second, the regulations found at 50 CFR 224.103(c) are intended to protect right whales from ship strikes by prohibiting vessels from approaching within 500 yards (460 m) of a right whale. Finally, NMFS is currently working toward developing and implementing a ship strike reduction strategy.

Comment 10: One commenter expressed opposition to the petitioned expansion of critical habitat because he/she felt that the petitioners have not presented sufficient evidence that expanding critical habitat and implementing regulations to reduce vessel speeds within critical habitat will provide protection for right whales.

Response: See response to comment 9. Comments on the Process for Revising Critical Habitat

Comment 11: One commenter suggested that NMFS advise the relevant regulated communities (i.e., commercial fisheries and shipping) on the possible effects that the petition and any subsequent critical habitat designation may have on future management measures.

Response: NMFS agrees that the relevant regulated communities should be informed about the petition to revise critical habitat, NMFS's responses to the petition, and how the agency intends to proceed with the requested revision. NMFS provided copies of the petition and 90-day notice and finding to team members and interested parties at the recent meeting of the ALWTRT. A presentation was also given at the meeting on critical habitat in general and made specific reference to the

petitioned revision. In addition, prior to the meeting, the ALWTRT was made aware of the petitioned action through an email distribution and by posting the relevant documents on the Web Site for the ALWTRP as well as on the NOAA Fisheries home page (*see* Electronic Access). NMFS provided similar notice to the shipping community through the Ship Strike Reduction e-mail distribution list and a presentation to the Southeast U.S. Right Whale Recovery Plan Implementation Team.

Comment 12: One commenter expressed concern that neither the petition nor the **Federal Register** notice provided a substantive discussion of economic impacts. Furthermore, this commenter suggested that NMFS carefully analyze the data relied upon to designate critical habitat and apply designation criteria uniformly to avoid undue economic costs or economic dislocation to the shipping industry as the agency proceeds with ship strike mitigation measures. Finally, this commenter suggested that NMFS articulate to the public that management measures may not have the same or coincident boundaries as those of a revised critical habitat.

Response: Both the ESA and the regulations for designating critical habitat found at 50 CFR 424.12 require NMFS to consider economic impacts, and any other relevant impact, of specifying any particular area as critical habitat. At this time, an analysis of economic impacts is not required, because NMFS has not yet proposed any areas for designation as part of an effort to revise right whale critical habitat. In other words, the agency has not defined the area in which an analysis of economic impacts may be applied. However, NMFS has determined that an economic analysis will be included among the steps the agency has identified for any future revision of critical habitat. NMFS agrees with the final point made by the commenter, and the public will be notified if the agency decides to implement management measures whether or not it revises critical habitat.

Determination on the Petition

Critical habitat is defined in section 3(5)(A) of the ESA as the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. In addition, under section 3(5)(A) of the ESA, critical habitat may include specific areas outside the

geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

NMFS has decided not to designate critical habitat in accordance with the petitioned revision because the information presented in the petition does not adequately support the petitioned new boundaries for critical habitat. The revisions proposed by the petitioner are largely based on where whales have been found and general information on what the whales may be doing in those areas rather than on the specific nature and location of the physical or biological features of the habitat that are essential to the conservation of the species.

For example, in discussing the value of "space" for individual and population growth and for normal behavior, the petitioner states that the requested revision will "cover areas that consistently maintain large numbers of western North Atlantic right whales and the conditions they require for individual and population growth as well as normal behavior" (Petition p. 21). However, the petitioner fails to identify or discuss with the necessary degree of detail what those conditions are that would be necessary for individual and population growth, and normal behavior, or how these features are essential to the conservation of right whales. Therefore, without establishing a nexus between the specific habitat feature and the requested revision, beyond the premise that the area is used by large numbers of right whales, the petition does not support the suggested changes to critical habitat boundaries.

With regard to its discussion of "food, water, air, light, minerals, or other nutritional or physiological requirements," the petition indicates that right whales require high densities of prey for effective feeding. However, the petition does not present information identifying what those densities are, what features of the habitat lead to the concentration of prey, or evidence that the expanded boundaries incorporate additional areas in which sufficiently high densities of prey are likely to exist.

With regard to its discussion of "cover or shelter," the petition indicates that the proposed additions to the northern and southern areas "exhibit temperature, salinity, and bathymetric requirements needed to provide shelter for western North Atlantic right whales." However, the petition does not indicate specifically what those temperature, salinity, and bathymetric features are or provide evidence that the

expanded boundaries incorporate additional areas in which those features are likely to exist.

With regard to its discussion of "sites for breeding, reproduction, and rearing of offspring," the petition indicates that new information suggests that female right whales and calves utilize the waters farther offshore of the Southeastern U.S. than initially documented. While NMFS agrees that new information does indicate females and calves use waters farther offshore than initially believed, the existence of right whales farther offshore is not, in and of itself, a physical and biological feature essential to the conservation of the species. The petition does not indicate what the physical and biological features are of these waters that make them appeal to female right whales and their calves. As a result, the petition does not provide sufficient support for the proposed expansion of the critical habitat area in the southeast U.S.

With regard to its discussion of "habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of species," the petition indicates that the areas petitioned for inclusion as critical habitat "focus on the most vital portions of the historic range where current data indicate that large numbers of right whales aggregate for extended periods of time." However, the petition does not support the expanded boundaries by indicating what specific physical and biological features make those areas vital.

Accordingly, based on the language found in section 3(5)(A)(i)(I) of the ESA that defines critical habitat, in part, as specific areas "on which are found those physical or biological features essential to the conservation of the species," and for the reasons previously discussed, NMFS believes that the petition does not provide sufficient information to support the requested revision. However, a review of scientific information suggests that physical and biological features essential to the conservation of right whales may include, but are not necessarily limited to, the occurrence of copepods and the features that concentrate them in the water off of the Northeast U.S., as well as sea surface temperature and possibly bathymetry in the waters off of the Southeast U.S. Further investigation and analysis needs to be performed regarding the specific nature of those features and/or others, whether they are essential to the conservation of right whales, and, if so, where they are located and whether they may require

special management considerations or protection.

How Does NMFS Intend To Proceed?

Section 4(b)(3)(D)(ii) of the ESA requires that NMFS, within 12 months of the date a petition is received, make a determination on how it intends to proceed with the requested revision and promptly publish notification of such intention in the **Federal Register**. NMFS made its determination in the previous section of this notice that the requested revision, as specified by the petitioner, is not warranted at this time. However, NMFS intends to continue with planned research activities during 2003 and evaluate new information to determine whether physical and biological features essential to the conservation of the species exist that may warrant a revision of critical habitat. To further investigate those physical or biological features essential to the conservation of the North Atlantic right whale, and to propose any revisions to designated critical habitat that might be supported by new information and analysis, NMFS would have to complete at least the following steps:

(1) In the waters off of the Southeast U.S., continue analysis of right whale distribution data in relation to bathymetry and sea surface temperature derived from Advanced Very High Resolution Radiometer (AVHRR) imagery;

(2) In the waters off of the Northeast U.S., continue its own efforts, as well as collaborate with others working in the Gulf of Maine Ecosystem, to characterize the spatial and temporal distribution of zooplankton;

(3) Examine the available scientific information to assess whether other physical or biological features of the environment are essential to the conservation of the species;

(4) Identify those "specific areas within the geographical area occupied by the species, at the time it is listed..., on which are found" one or more of the physical or biological features determined to be essential for conservation;

(5) Evaluate the current or future special management considerations or protections relevant to the habitat features determined to be essential for conservation;

(6) Evaluate the economic and other relevant impacts of including any particular area in the designation of critical habitat, weigh these benefits and negative impacts, and determine whether exclusion of any area would lead to the extinction of the North Atlantic right whale; and

(7) Identify specific areas outside the geographical areas occupied by the North Atlantic right whale at the time it was listed, that are essential to the conservation of the species, and evaluate the impacts of designating any of these areas as critical habitat.

While NMFS intends to investigate further the nature and location of physical and biological features essential to the conservation of right whales and will evaluate new information to determine whether a proposed rule to revise critical habitat is appropriate, this notice should not be misinterpreted as a commitment to take any particular action because any such commitment would be premature at this time. If a revision of critical habitat is warranted in the future, NMFS will provide notice to the public as required by the ESA.

All references are available upon request (**see FOR FURTHER INFORMATION CONTACT**).

Authority: 16 U.S.C. 1531 *et seq.*

Dated: August 22, 2003.

Rebecca Lent,

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

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 030820209-3209-01; I.D. 081203B]

RIN 0648-AR37

Fisheries off West Coast States and in the Western Pacific; Western Pacific Bottomfish Fisheries; Guam and Commonwealth of the Northern Mariana Islands; Control Date

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

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: NMFS announces that persons who enter the bottomfish fisheries in waters of the U.S. exclusive economic zone (EEZ) around Guam and the Commonwealth of the Northern Mariana Islands (CNMI) after June 13, 2003, ("control date") are not guaranteed future participation in these fisheries. This action does not commit the Council or NMFS to limit entry, or

prevent any other date from being selected for eligibility to participate in the bottomfish fishery off Guam and/or CNMI. The Council or NMFS may also use other criteria to limit fishing effort or participation in a limited entry program that is developed in the future. The purpose of this action is to notify persons interested in joining these fisheries after June 13, 2003, that they may be excluded if restrictions are adopted in the future.

DATES: Comments must be submitted in writing by September 29, 2003.

ADDRESSES: Submit written comments to Kitty M. Simonds, Council Executive Director, 1164 Bishop Street, Suite 1400, Honolulu, Hawaii, 96813; or faxed to (808) 522-8226. Comments will not be accepted if submitted via E-mail or Internet.

FOR FURTHER INFORMATION CONTACT:

Kitty M. Simonds at 808-522-8220.

SUPPLEMENTARY INFORMATION: On June 13, 2003, at its 118th meeting, the Council adopted a "control date" of June 13, 2003, as a notice to persons contemplating entering the fisheries for bottomfish species in the EEZ around Guam and CNMI. This action would not impose any restrictions on the public, but is intended solely to notify persons who joined or may join these fisheries after June 13, 2003, that they might be excluded if restrictions are adopted in the future under the Magnuson-Stevens Fishery Conservation and Management Act.

This control date does not commit the Council or NMFS to any particular management regime or criteria for entry into the bottomfish fisheries off Guam and/or CNMI. Fishermen are not guaranteed future participation in either or both fisheries, regardless of their level of participation before or after the control date. The Council may choose a different control date or it may choose a management regime that does not involve a limited access program. Documentation of fish landings and sales may be used to determine eligibility for participation in a limited access fishery. The Council also may choose to take no further action to control entry or access to the fishery, in which case the control date may be rescinded.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 25, 2003.

Rebecca Lent,

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

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