

Background

The ALWTRP (50 CFR 229.32) is a multi-faceted plan that includes area closures, gear requirements in areas open to fixed gear fishing, gear research to develop new modifications to current practices and/or fishing techniques, a right whale Sighting Advisory System, and a disentanglement program to free whales caught in fishing gear.

As part of the ALWTRP, NMFS issued a final rule to implement the Dynamic Area Management (DAM) program (67 FR 1133, January 9, 2002; 67 FR 65722, October 28, 2002), which clarified its authority under 50 CFR 229.32 to temporarily restrict the use of lobster traps and/or anchored gillnet gear in areas where right whales aggregate. The DAM program establishes criteria and procedures to temporarily restrict lobster trap and anchored gillnet gear on an expedited basis within defined areas (i.e. DAM zone) north of 40° N. latitude in order to further reduce risk of entanglement to right whales by such gear. When the criteria for establishing a DAM zone are triggered, NMFS may implement fishing restrictions within the DAM zone through publication in the **Federal Register**.

Factors NMFS would consider in deciding what restrictions to implement within the DAM zone include: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data. Once a DAM zone is identified, the regulations allow NMFS to: (1) require the removal of all lobster trap and anchored gillnet fishing gear for a 15-day period; (2) allow modified lobster trap and anchored gillnet gear within a DAM zone for a 15-day period; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap and anchored gillnet gear for a 15-day period, and asking fishermen not to set any additional gear in the DAM zone during the 15-day period. NMFS may either extend or shorten the duration of the DAM zone depending on the presence or absence of right whales in the DAM zone.

While the DAM final rule did envision, at some point in the future, that DAM zones could be implemented with gear modifications, it did not identify specific gear modifications that would sufficiently reduce the risk of entanglement to right whales. Therefore, no gear modifications were included within the analysis that supported the DAM rulemaking. This proposed rule

would identify acceptable gear that could be allowed under the DAM program. This proposed rule, if adopted, would complete the regulatory actions planned and described in the recent amendments to the ALWTRP, which included the Seasonal Area Management (SAM) program (67 FR 1142, January 9, 2002; 67 FR 65722, October 28, 2002), expanded gear modifications (67 FR 1300, January 10, 2002; 67 FR 15493, April 2, 2002), as well as the DAM program.

Proposed Lobster Trap and Anchored Gillnet Gear Modifications for Use in DAM Zones

On January 9, 2002, NMFS established a SAM program (67 FR 1142) to protect predictable annual congregations of right whales in the waters east of Cape Cod and seaward to the outer limits of the Exclusive Economic Zone (EEZ). Under the SAM program, NMFS defined two areas (SAM West and SAM East) and required gear modifications for lobster trap and anchored gillnet gear within these defined areas. The interim final rule restricts lobster trap and anchored gillnet gear set within each SAM area to those types designated as Level II or Low Risk Gear, which is defined as gear where death or serious injury resulting from entanglement would be highly unlikely. The requirements under the SAM program are more stringent than, and in addition to, the gear modifications currently required under the ALWTRP for Northern Inshore State Lobster Waters, Northern Nearshore Lobster Waters, Offshore Lobster Waters, and Other Northeast Gillnet Waters.

The information and analysis provided in the proposed rule for the SAM program (66 FR 59394, November 28, 2001) demonstrates that the gear modifications, including replacing floating line with neutrally buoyant and/or sinking line, installing additional weak links, reducing breaking strengths for weak links and limiting the number of buoy lines (i.e. allowing only one buoy line) prevent serious injury or mortality to right whales. NMFS estimated that the SAM requirements resulted in approximately an 85-percent reduction in floating line for offshore lobster gear and 50-percent reduction in vertical line for gillnet and lobster gear. Thus, the SAM gear modifications reduce both the potential for interaction through a significant reduction in floating and vertical line, and the potential for serious injury or mortality through the incorporation of additional weak links at reduced breaking strengths.

As the DAM program was developed in advance of the SAM program, NMFS was not able to identify or analyze SAM gear as part of the DAM program. This proposed rule identifies and analyzes the SAM gear as gear that could be used under the DAM program. NMFS believes that Level II or Low Risk gear modifications are appropriate to allow in a DAM zone because this gear has been determined to sufficiently reduce risk of entanglement of right whales. NMFS maintains that the data available and presented in the SAM proposed rule provides sufficient evidence that fishing with SAM modified gear in a DAM zone is unlikely to result in serious injury or mortality of a right whale.

This proposed rule would identify SAM modified gear as gear that could be allowed under the DAM program. NMFS analyzed additional management alternatives when deciding which type of gear modification to allow within the DAM zone (see **ADDRESSES** section for a copy of the Environmental Assessment (EA) and Classification section's summary of the Initial Regulatory Flexibility Analysis, which describes other alternatives considered). NMFS seeks comments from the public on this proposed rule and these alternatives.

The proposed gear modifications to the ALWTRP DAM program are described below. These requirements are more stringent than, and in addition to, the gear modifications currently required under the ALWTRP for the Offshore Lobster Waters, Northern Nearshore Lobster Waters, Southern Nearshore Lobster Waters, Northern Inshore State Lobster Waters, Great South Channel Restricted Lobster Area (July 1 through March 31), Stellwagen Bank/Jeffreys Ledge Restricted Area (lobster trap and gillnet area descriptions), Cape Cod Bay Restricted Area (lobster trap and gillnet area descriptions; May 16 through December 31), Great South Channel Restricted Gillnet Area (July 1 through March 31), Great South Channel Sliver Restricted Area (July 1 through March 31), Mid-Atlantic Coastal Waters (gillnet area description) and Other Northeast Gillnet Waters and are consistent with the gear restrictions implemented under the SAM program. Time periods are incorporated to clarify when critical habitat areas are subject to the DAM program, which, as described (66 FR 50160, October 2, 2001; 67 FR 1142, January 9, 2002) and implemented by NMFS, are time periods when the requirements for critical habitat areas are no more conservative than the surrounding waters. Additionally, proposed SAM gear modification