

However, if a DAM action is triggered and NMFS implements gear modifications in the DAM zone, fishermen will be required to comply with the specified gear modifications or remove their gear from the area. In order to provide fishermen with enough time to respond to restrictions in a DAM zone, NMFS will issue a notice at the time the action is filed with the Office of the **Federal Register**, which is usually 3 to 5 days prior to the regulation being published in the **Federal Register**. Once the decision has been made to modify gear inside a DAM zone, NMFS will notify the commercial fisheries affected as quickly and comprehensively as possible. In addition, NMFS will issue an alert via email to all ALWTRT members and post the alert on the website at [www.nero.nmfs.gov/whaletrp/](http://www.nero.nmfs.gov/whaletrp/). NMFS hopes that members of the ALWTRT who receive an alert will circulate the information to other interested parties to help ensure that the fishermen who may have to comply with the gear restrictions in a DAM zone have time to respond. Fishermen, industry representatives, environmental groups, and all others interested in receiving alerts and notices over the Internet should provide their email address to the Northeast Regional Office (see **ADDRESSES**). NMFS will also mail letters providing notice to those who request it by contacting the Northeast Regional Office (See **ADDRESSES**).

*Comment 20:* One commenter suggested that NMFS exempt small-scale fishing operations in state waters from the DAM program. Another commenter expressed opposition to any DAMs or SAMs in state waters.

*Response:* The MMPA applies to state waters and there have been aggregations of right whales, which the DAM and SAM rules are designed to address, in state waters. NMFS is currently investigating the feasibility and practicality of revising the exempted waters of the ALWTRP to possibly include other inland areas where the presence of large whales is rare or non-existent.

#### Changes From the Proposed Rule

In the March 4, 2003 proposed rule (68 FR 10195), NMFS identified as its preferred alternative gear modifications for anchored gillnet and lobster trap/pot gear that could be allowed within a DAM zone. In the preamble to the proposed rule, NMFS sought comment from the public on the proposed regulations and the alternatives analyzed. Based on comments received during the public comment period, and as explained below, NMFS has concluded that its original preferred

alternative may not afford the level of protection to right whales as one of the other alternatives discussed in the EA/RIR. Therefore, NMFS has determined that the alternative identifying SAM gear modifications with the allowance for a second endline and floating line on the bottom third of each endline should be implemented as gear that could be allowed within a DAM zone.

Comments received from the public requested that NMFS identify gear modifications similar to those currently required by the ALWTRP in Cape Cod Bay Critical Habitat during the high use time period for right whales (January 1 - May 15). The Cape Cod Bay Critical Habitat gear requirements allow two buoy lines with floating line on the bottom third of each endline. These gear modifications were analyzed in the Draft and Final EA/RIR. Based on this analysis, NMFS believes that this gear sufficiently reduces the risk of entanglement to right whales. This gear is currently allowed in a critical habitat area during the time period when high concentrations of whales occur in the area. Additionally, information received through the comment period supports underwater video footage taken by NMFS and discussed in the EA/RIR, which demonstrates that, due to current and tidal action on the surface system, allowing one-third polypropylene line on the bottom third of the buoy line does not typically produce a loop in the water column, which could increase risk to right whales. Since publication of the proposed rule, NMFS has determined that requiring gear modifications with one buoy line in a DAM area may not necessarily result in a 50-percent reduction in vertical line in the water column as fishermen may fish shorter trawls, which may result in the same or a greater number of buoy lines. Allowing SAM gear modifications with a second endline and one third polypropylene line on the bottom third of the buoy line in DAM zones reduces both the potential for interaction through a significant reduction in floating line (in the groundline) and the potential for serious injury or mortality through the incorporation of additional weak links at reduced breaking strengths. Thus, DAM gear modifications, including replacing floating line with neutrally buoyant and/or sinking line in the groundline, installing additional weak links, and reducing breaking strengths for weak links, sufficiently reduces the risk of serious injury or mortality to right whales in DAM zones.

#### Classification

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

This final rule would identify gear modifications that reduce the risk of entanglement to right whales sufficiently to be an option under the DAM program. The objective of this final rule, issued pursuant to section 118 of the MMPA, is to reduce the level of serious injury and mortality of right whales in East Coast lobster trap and finfish gillnet fisheries. Additionally, this final rule enables NMFS to exercise the full range of management options that the agency intended to be available under the DAM program.

NMFS prepared a Final Regulatory Flexibility Analysis (FRFA) for this final rule. A copy of the FRFA is available from NMFS (see **ADDRESSES**). Four alternatives, including a status quo or no action alternative, the preferred alternative (PA), and two other alternatives were evaluated using a retrospective analysis based on 2000 right whale sightings data and 2000 Vessel Trip Report (VTR) data. Under all alternatives, from June 20th to July 6th, 45 vessels (29 lobster vessels and 16 sink gillnet vessels) were affected by a DAM zone. A summary of the analysis follows:

1. NMFS considered a "no action" or status quo alternative that would result in no changes to the current measures under the ALWTRP. The no action alternative would result in NMFS only having the options of requiring the removal of all lobster trap and anchored gillnet gear from a DAM zone or issuing an alert requesting the voluntary removal of all gear. NMFS rejected this alternative as NMFS would not be able to exercise the full range of management options that the agency intended to be available under the DAM program.

2. NMFS considered an alternative (NPA 1) that would allow SAM gear modifications to be used under the DAM program. SAM gear modifications include, among other requirements, the use of neutrally buoyant or sinking line on all ground lines and buoy lines and restricts fishermen to one endline (buoy line) per trawl or string. Due to comments received, NMFS understands that requiring gear modifications with one buoy line in a DAM area may result in fishermen splitting trawls or strings into shorter trawls or strings (to avoid increased gear conflict and gear loss), which may result in the same or a greater number of buoy lines, thus increasing the risk to whales. Furthermore, comments received and a study conducted after publication of the