RESPONSE TO COMMENTS ON THE DEIS AND PROPOSED RULE CHAPTER 1

NMFS received 81 letters from commenters on the Draft Environmental Impact Statement (DEIS) via letter, fax, or email. Additionally, two form letter were received on the DEIS via letter and email; approximately 25,000 of one form letter and 73 of another form letter. NMFS also solicited comments on the DEIS during 13 public hearings held along the Atlantic coast. The public hearings were held as follows:

- Virginia Beach, Virginia, on March 14, 2005,
- Kill Devil Hills, North Carolina, on March 15, 2005,
- Wilmington, North Carolina, on March 16, 2005,
- Barnegat Light, New Jersey, on March 21, 2005,
- Ocean City, Maryland, on March 22, 2005,
- Cape Canaveral, Florida, on March 23, 2005,
- Plymouth, Massachusetts, on March 28, 2005,
- Newport, Rhode Island, on March 29, 2005,
- Gloucester, Massachusetts, on March 31, 2005,
- Ellsworth, Maine, on April 4, 2005,
- Rockport, Maine on, April 5, 2005,
- East Machias, Maine on, April 6, 2005, and
- Portland, Maine, on April 7, 2005.

NMFS received 37 letters from commenters on the proposed rule via letter, fax, or email. The substantive comments are summarized and grouped below by major subject headings. NMFS' response follows each comment. NMFS received comments on FEIS technical changes that were not substantive, and incorporated such changes in the FEIS as appropriate. These technical comments are not listed in the summary.

NMFS solicited comments and information from the public on issues related to "low profile" groundline (e.g., prey distribution, large whale distribution and behavior, and methods for reducing the profile) and received numerous comments. As many of those comments are not directly related to the present rulemaking action, NMFS did not respond to all of the comments received during the public comment period in this rule. However, the summary highlights several low profile comments and presents NMFS' responses to those comments, which provide a general overview of the issues surrounding the concept of low profile. NMFS will provide all comments regarding low profile to the Atlantic Large Whale Take Reduction Team (ALWTRT) at the next meeting when low profile groundline will be discussed further. NMFS and the ALWTRT will have an opportunity to review and consider these comments at that time.

NMFS also solicited comments and information from the public on issues related to vertical line (e.g., how whales utilize the water column, gear modification options) and received comments. Responses to vertical line comments related to this rulemaking action are below. Those comments that are outside the scope of the present rulemaking action are not responded to in this rule but will be provided to the ALWTRT when options for reducing risk associated with vertical lines will be discussed further. NMFS and the ALWTRT will have an opportunity to review and consider these comments at that time. It is important to note that NMFS provided the ALWTRT with a list of management options to reduce risk associated with vertical line to support future discussion on this issue. Additionally, NMFS is funding an analysis to evaluate the effectiveness of current and/or future fishing effort reductions in decreasing the amount of vertical line in the water column. This information will be provided to the ALWTRT at the next meeting to assist in the discussion and development of recommendations to NMFS on reducing risk associated with vertical line.

1.1 COMMENTS AND RESPONSES

1.1.1 General Comments

Comment 1: Some commenters asked for a more balanced representation of stakeholders on the ALWTRT. Specifically, commenters believed that there should be more seats for conservationists on the ALWTRT.

Response: The ALWTRT is composed of Federal agencies, each coastal state that has fisheries that interact with large whale species or stocks protected under the ALWTRP, Regional Fishery Management Councils, interstate fisheries commissions, academic and scientific organizations, environmental groups, and all commercial fisheries groups and gear types which incidentally take large whale species or stocks. The Marine Mammal Protection Act (MMPA) states that take reduction teams shall, to the maximum extent practicable, consist of an equitable balance among representatives of resource user interests and nonuser interests. The MMPA does not provide a fixed number or percentage for each stakeholder group. NMFS believes that it has an adequate representation of stakeholders including conservationists.

Comment 2: One commenter suggested that better results would be produced by the ALWTRT if issues were addressed regionally.

Response: At its 2004 meeting, NMFS provided detailed information on organizational issues specific to the ALWTRT. NMFS presented several options for restructuring the ALWTRT and the pros and cons of each option. One option included a regional component whereby the ALWTRT would split into two regional teams (Northeast and Mid/South Atlantic). However, the ALWTRT did not develop a consensus recommendation on formally dividing the ALWTRT into separate teams by region or other affiliation. Currently, the ALWTRT is continuing to meet as a full team, but NMFS has allocated resources to conduct small scale regional sub-group meetings when necessary. In addition, NMFS has allocated time in its full ALWTRT meetings for smaller groups according to region, gear type, or other affiliation.

Comment 3: Several comments were received in support of, as well as in opposition to, the proposed elimination of the Lobster Take Reduction Technology List in Northern Inshore waters.

Response: As proposed, NMFS has eliminated the Lobster Take Reduction Technology List in Northern Inshore waters and other areas. Eliminating the Lobster Take Reduction Technology List in Northern Inshore waters will enable NMFS to utilize broad-based management measures in the Inshore waters. However, NMFS acknowledges that the elimination of the Technology List does not preclude NMFS from using a similar management scheme in the future if warranted.

Comment 4: Two commenters requested that all information used in formulating proposed alternatives and effectiveness of existing programs be provided to the public. NMFS

should develop and implement a statistically reliable methodology for measuring and reporting serious injury and mortality rates of all species of marine mammals, as required by the MMPA.

Response: In support of the proposed action, NMFS prepared a DEIS. In accordance with the National Environmental Policy Act (NEPA), the DEIS disclosed the purpose and need for the action; a description of the proposed alternatives, including a No Action Alternative; a description of the affected environment; and a description of the environmental consequences of each alternative including any adverse environmental effects that will be unavoidable if the proposed action is implemented. As required by NEPA, NMFS made all of the information and analysis contained in the DEIS available to the public for an 81 day written comment period and conducted 13 public hearings from Maine to Florida to receive oral testimony regarding this action and its supporting information and analysis. All comments received during the public comment period and public hearings were considered in the FEIS and final rule.
NMFS has developed protocols for determining large whale serious injuries and human-caused mortalities. Such information is contained in mortality and serious injury determinations issued by the Northeast Fisheries Science Center (NEFSC). Human-caused mortality and serious injury rates presented in these reports represent the minimum levels of impact to Atlantic large whale stocks from 1999-2003 (Waring *et al.* 2006). Confirmed human-caused mortalities and serious injury records from 2000-2004 are also presented in Cole *et al.*(2006). Both reports are available to the public through the NEFSC publications office and can also be located online. NMFS does not attempt to expand data beyond that which was observed, and at this time, there is no reliable methodology that enables NMFS to extrapolate further from this data.

Comment 5: Two commenters suggested implementing a ghost gear removal program.

Response: NMFS does not currently have the resources to administer and/or implement such a program. However, NMFS has supported ghost gear removal initiatives in the past through its Right Whale State Cooperative Program, which is administered through its partnership with the National Fish and Wildlife Federation (NFWF), and will continue to consider future support for ghost gear removal through this competitive funding initiative.

Comment 6: Two commenters suggested that the observer program is not being used to its fullest potential. Specifically, one commenter urged NMFS to prioritize observer coverage for ALWTRP fisheries. The commenter believes this would assist in assessing the effectiveness of gear modifications and seasonal closures.

Response: Based on the limited observer resources available and the competing needs for observer coverage in many other fisheries, NMFS believes that the observer program is being used to the fullest extent practicable given the resources available and competing observer needs in other fisheries. Although NMFS agrees in principle with the commenter's suggestion that increased observer coverage could assist in assessing the effectiveness of gear modifications and seasonal closures, the NMFS observer program is not intended to be an extension of law enforcement resources. The National Observer Program is intended and designed to collect fisheries dependent physical, biological, and economic data to assist NMFS in making

management decisions.

Comment 7: Many commenters questioned why the Federal Government is making regulations and not individual states. Specifically, some commenters stated that Federal mandates are not going to work for the State of Maine while others stated that there are already state fishery management plans (FMPs) (e.g., the State of Florida's Spanish Mackerel Plan) that impose rules that are more protective of whales than the alternatives proposed by the ALWTRP.

Response: The MMPA gives NMFS the authority to administer the provisions of the MMPA within state waters. To protect the large whale stocks included under the ALWTRP from serious injury or mortality incidental to commercial fishing interactions, NMFS convenes the ALWTRT to help develop appropriate management actions. The ALWTRT includes each coastal state that has fisheries that interact with large whale species or stocks protected under the ALWTRP. Each state also has industry representatives who serve on the ALWTRT. State officials and state industry representatives have input into the development of regulations within state waters. NMFS considered all comments regarding state fisheries and areas; this final rule modified certain provisions within state waters as a result of these comments.

Comment 8: One commenter stated concern that more fishermen may fish in the state exempted areas, which would create increased gear concentrations in inshore areas.

Response: In determining the state exemption lines, NMFS analyzed data from available sources, including data that are more current than the data analyzed for the DEIS. Large whale sightings distribution data from 1960 to mid-September 2005 were obtained from the North Atlantic Right Whale Consortium (NARWC) Sightings Database containing dedicated survey effort and opportunistic sightings data, which is curated by the University of Rhode Island (URI), and supplemented by additional data on humpback and fin whale sightings. In addition, NMFS analyzed large whale sightings data from 2002 through 2006 that were collected through the NEFSC's systematic aerial surveys, as well as through the Northeast U.S. Right Whale Sighting Advisory System (SAS). NMFS also analyzed a right, humpback, and fin whale sightings database compiled by the Maine Department of Marine Resources (Maine DMR), which includes sightings reported by the Maine Marine Patrol, whale watch vessels, etc. Based on this analysis, NMFS believes that the final exemption line will provide large whales with an adequate level of protection. For example, sightings data along the east coast indicated that endangered large whales rarely venture into bays, harbors, and inlets. Therefore, although gear may increase in the state exemption areas, the risk to large whales would be minimal.

Comment 9: One commenter stated that NMFS should not regulate Rhode Island fishermen the same as Cape Cod Bay fishermen.

Response: Assuming the commenter is fishing entirely in Rhode Island northern inshore waters and comparing their requirements to fishermen who fish in Cape Cod Bay during the restricted period, there are differences between how Rhode Island and Cape Cod Bay fishermen are being regulated under the ALWTRP. Specifically, the trap/pot gear restrictions and weak

link requirement are different for these areas and more restrictive in Cape Cod Bay from January 1 - May 15. Also, the provision to prohibit floating groundline does not take effect in Rhode Island until 12 months after publication of the final rule while the floating groundline prohibition is already in effect in Cape Cod Bay for trap/pot fishermen. Regarding gillnet gear, Cape Cod Bay is closed to all gillnet gear during the restricted season while Rhode Island inshore waters may use gillnets provided they comply with the specified gear requirements.

Comment 10: Numerous commenters believe NMFS should not regulate fishermen in the Mid-Atlantic/Southeast the same as those in New England and believe NMFS should justify new gear requirements in the Mid-Atlantic and provide a rationale of why impacts of new requirements are necessary to achieve the goals of the ALWTRP. The commenters believe that regional management areas should be managed differently for the following reasons: (1) Year-round closures are unnecessary in the Mid-Atlantic area; (2) there are relatively few right whale sightings; (3) there is less gear and fewer fishing vessels; (4) no critical habitat has been designated in the Mid-Atlantic; and (5) there are different regional and seasonal fishing practices in the New England, Mid-Atlantic, and Southeast fisheries.

Response: The ALWTRP was developed to reduce the level of serious injury and mortality of North Atlantic right, humpback, and fin whales. Although right whales and humpback whales are more common in New England throughout the year, they are also present in the Mid-Atlantic. Further, fin whales are common year-round north of Cape Hatteras. Therefore, NMFS believes all fisheries in these areas should be subject to similar gear modification requirements. However, based on sightings data and comments received on the proposed rule, NMFS chose an alternative that allows seasonal gear restrictions in the Mid-Atlantic as opposed to year round requirements in New England. Further, NMFS allowed small changes to some of these gear modifications to account for how local fisheries operate in the Mid-Atlantic (see “Changes from the Proposed Rule” section of the preamble).

Comment 11: One commenter calls for a set of regional alternatives rather than one national alternative for all East Coast fisheries.

Response: The alternatives examined in the EIS were the product of extensive outreach conducted by NMFS. NMFS reconvened the ALWTRT on April 28-30, 2003. Proposals from the April 2003 ALWTRT meeting and subsequent subgroup meetings were used to develop an issues and options document, which NMFS made available to the public during the scoping process. The scoping document described the major issues, current management and legal requirements, and potential management measures to address fisheries that may frequently or occasionally interact with large whales. During the summer of 2003, NMFS conducted six public scoping meetings at locations from Maine to Florida along the east coast. Based on this outreach effort NMFS developed a suite of alternatives that best reflected the comments from the ALWTRT and public while at the same time afforded protection to large whales. The alternative ultimately selected by NMFS does include regional measures.

Comment 12: One commenter believes NMFS needs to look at gear and effort in

different areas. The commenter believed that regulations are in place due to problems in Massachusetts, and if that is where the problem is then that is where the regulations should be, not for the entire coast.

Response: Large whale entanglements are not solely a Massachusetts issue. Atlantic large whales are at risk of becoming entangled in fishing gear because the whales feed, travel, and breed in many of the same ocean areas utilized for commercial fishing. Fishermen typically leave fishing gear such as gillnets and traps/pots in the water for specific periods of time. While the gear is in the water, whales may become incidentally entangled in the lines and nets that comprise trap/pot and gillnet fishing gear. The number of entanglements for which gear type can be identified is too small to detect any trends in the type of gear involved in lethal entanglements. However, trap/pot and gillnet gear are the most common. NMFS believes that floating groundlines pose the biggest risk for large whales, but acknowledges that any type and part of fixed gear is capable of entangling a whale throughout its entire range. NMFS, in consultation with the ALWTRT, has developed a coast-wide strategy with regional components to address entanglements.

Comment 13: One commenter asked how many whale entanglements occurred in traps/pots in 2004.

Response: There were 16 known entanglements that were first reported in 2004. However, for most of these, the actual year of entanglement is not known. Gear was recovered from seven of these entanglements. Of the seven entanglements from which gear was recovered, five were identified to a specific gear type. Trap/pot gear accounted for four entanglements and gillnet gear accounted for one.

Comment 14: One commenter believed that it is important that NMFS listen to the Maine DMR because they do a good job communicating with fishermen.

Response: NMFS views all state representatives serving on the ALWTRT as valued partners in making sound management decisions.

Comment 15: Several commenters believe that fishermen are unlikely to modify their gear for 9 months, and then switch to unmodified gear for 3 months. The commenter believes the economic burden on the industry would be relatively the same as year-round requirements.

Response: Many commenters asked NMFS to choose seasonal windows based on large whale distribution. Some commenters also supported seasonal requirements due to the occurrence of seasonal fisheries in some areas. However, the economic analysis in Chapter 6 of the EIS assumes that vessel operators that would be subject to seasonal ALWTRP requirements would switch to compliant gear year-round. Therefore, the implications of seasonal requirements are accounted for in the discussion of costs and socioeconomic impacts. Because the difference in costs between seasonal and year-round requirements is low, and the differences in biological impacts is also low, NMFS chose seasonal requirements.

Comment 16: One commenter believes that gillnets should be prohibited from the Stellwagen Bank National Marine Sanctuary and the number of lobster traps and lines should be limited.

Response: The regulations implementing the Northeast Multispecies FMP contain a closure provision named the Western Gulf of Maine Closure Area. The closure area encompasses the vast majority of the Stellwagen Bank National Marine Sanctuary. Accordingly, no fishing vessel or person on a fishing vessel may enter, fish in, or be in, and no fishing gear capable of catching NE multispecies, including gillnet gear, may be in, or on board a vessel in, the Western Gulf of Maine Closure Area. The Interstate FMP for American Lobster has also implemented an effort reduction strategy that limits the volume of trap/pot gear targeting lobsters. In addition to the management efforts in specific FMPs, through this final action the ALWTRP is implementing measures that significantly reduce the risk of an entanglement and serious injury and mortality of large whales should an entanglement occur, such as implementing a prohibition on floating groundline for trap/pot and gillnet gear and an increase in the number of break away links in the net panels of gillnet gear. Floating rope between traps/pots, and the gillnets and anchor systems gear serves as the greatest risk to large whale entanglements.

Comment 17: Some commenters believe that NMFS needs a better international strategy, otherwise Maine fishermen are shouldering the burden of whale conservation. The commenter believes Maine fishermen take on more compliance costs than are necessary, while their counterparts in other industries and in Canada operate free of whale take reduction measures.

Response: Since the implementation of Canada's Species at Risk Act (SARA), NMFS has established a strong relationship with Canada's Department of Fisheries and Oceans (DFO) regarding right whale management. In recent years, NMFS staff from the Northeast Regional Office and DFO's Maritime Regional Office have met to coordinate on several critical right whale management and science issues. Of particular importance is the development of a collaborative approach to managing both gear and vessel interactions with large whales.

Because of the geographic concentration of the lobster fishery in Maine, it is true that Maine vessels bear a large share of the overall estimated costs of the ALWTRP modifications. However, the social impact analysis suggests that under Alternative 6 Final (Preferred) only a limited subset of smaller vessels are likely to experience costs that represent a large share of fishing revenues. As reviewed in the cumulative effects analysis in the FEIS, fishing gear entanglement and ship strikes are the two largest contributors to human-caused whale mortality. NMFS is currently working on implementing a ship strike strategy that will seek to reduce injuries and mortalities associated with this source. Chapter 9 of the EIS also reviews a variety of measures implemented by the Canadian government. In 2000, DFO, in cooperation with the World Wildlife Fund Canada, developed Canada's first Right Whale Recovery Plan and recovery implementation team. The recovery plan, which is intended as a "blueprint" for action, includes a number of recommendations related to gear entanglement, whale research, and regulatory and enforcement actions.

Comment 18: One commenter believes that it is too difficult to determine what gear

modifications will save right whales. The commenter believes that there is no one specific gear modification that we can point to and say that it is going to save right whales.

Response: NMFS agrees that currently there is no one gear modification that can save right whales. NMFS believes that the success of the ALWTRP and right whale conservation depends on a combination of conservation measures designed to reduce entanglements and serious injury and mortality should an entanglement occur. The ALWTRP includes a combination of fishing gear modifications and time/area closures to reduce whale entanglement in commercial fishing gear. The nature of the gear modification requirements varies by location and time of year, maximizing reduction in entanglement risk based on whale distribution and movement. NMFS complements these gear modification requirements with prohibitions on fishing at times and in places where right whale aggregations are greatest, and therefore where entanglement risk may be particularly high.

Comment 19: One commenter believed fishermen cannot control ship strikes or entanglements with fishing gear that is obviously not from the Northern Nearshore Lobster Waters Area. The commenter believes that Maine fishermen are required to compromise to fix a problem that they are not causing.

Response: NMFS is addressing vessel interactions with large whales through a separate action (71 FR 36299, June 26, 2006). The number of entanglements for which gear type can be identified is too small to detect any trends in the type of gear involved or the area where the entanglement occurred. However, trap/pot and gillnet gear appears to be the most common gear involved in entanglements. Based on the limited information available on entanglements, NMFS views the entanglement issue as a coast-wide problem rather than solely a "Maine problem". Consequently, NMFS in consultation with the ALWTRT, has developed a coast-wide strategy with regional components to address entanglements.

Comment 20: One commenter stated that in Grand Manan Channel, Machias, Seal Islands, and many areas in Down East Maine, fishermen cannot operate under existing requirements (i.e., weak links cannot hold and fishermen are constantly replacing poly balls).

Response: In developing the appropriate breaking strengths for weak links used by commercial fishermen in this area, NMFS worked closely with the ALWTRT, including commercial fishermen and the state of Maine to develop what it believes is the appropriate breaking strength tolerance for fishermen fishing in this area. Should new information become available that may warrant a change to the weak link tolerances in this area, NMFS will consult with the ALWTRT regarding whether to take a subsequent action.

Comment 21: One commenter believes that environmentalists are pushing NMFS to over-regulate and that fishermen are being put out of business everyday.

Response: Federal regulations are not based on pressure from environmentalists. The purpose of the revisions to the ALWTRP is to provide additional conservation and protection to

Atlantic large whales. Such revisions would fulfill NMFS' obligations under the ESA and the MMPA. The need for the revisions in this final rule is demonstrated by the continuing risk of serious injury and mortality of Atlantic large whales due to entanglement in commercial fishing gear.

Comment 22: Many commenters believed that the DEIS is not adequate for the following reasons: (1) It failed to follow NEPA requirements; (2) it disregarded certain comments provided during the scoping process; and (3) it lacked an assessment of the biological benefits to large whales that are likely to occur as a result of implementing these modifications to the ALWTRP.

Response: The DEIS complies with all applicable requirements of NEPA and contains, among other analyses, complete assessments of the biological, social, economic, and cumulative impacts associated with this action. In addition, the DEIS summarizes and integrates the biological, economic and social impacts analyses allowing for a broad assessment of the relative merits of the regulatory alternatives considered by NMFS. The DEIS also contains a discussion of the alternatives considered but rejected by NMFS. The DEIS summarizes various approaches and briefly explains why NMFS chose not to integrate the approach into the regulatory alternatives under consideration by NMFS. However, based on public comment, some of the discussions regarding why some of the approaches were not adopted by NMFS was expanded upon in the FEIS to better articulate NMFS' rationale.

Comment 23: One commenter stated that the DEIS fails to discuss the ethical values of whales and the marine environment, which deserve protection from human interference and threats. The commenter believed that DEIS Chapter 7 in particular discusses social impact on fishermen's quality of life, but shows no contrasting view of spiritual and intellectual enjoyment of whales.

Response: Under NEPA, a Federal agency is not required to consider non-physical effects such as psychological effects or moral and ethical values caused by or in anticipation of a proposed action. Nonetheless, the analysis contained in the DEIS does discuss passive uses as raised by the commenter. The DEIS discusses passive use in Chapter 10, the regulatory impact review section. Chapter 7 of the DEIS also discusses "passive uses" and provides a table of passive use studies related to marine mammals. Language has been added to the FEIS to clarify that non-use values such as those measured in these studies are closely related to the "spiritual" or "ethical" values emphasized by the commenter.

Comment 24: One commenter supported continued disentanglement efforts, such as floating forklifts, hydraulic slings between two boats, and an inflatable blanket to keep a subdued whale afloat.

Response: NMFS appreciates the support for continued disentanglement efforts. NMFS recently convened a third workshop in a series, which included marine animal experts from numerous disciplines including, veterinarian sciences, disentanglement experts, anesthesiology, marine mammal behaviorists, etc., to discuss these suggested approaches as well as many other

options to ascertain which had the most merit for investigating further versus which were too cost prohibitive and logistically impractical. NMFS reiterates that disentanglement is only a temporary "band-aid" approach and that the solution that all involved parties are striving for is to prevent entanglement and reduce serious injury and mortality, if an entanglement occurs.

Comment 25: Two commenters believed NMFS did not address minke whales in the EIS. One commenter said that the ALWTRP currently does not consider minke whales, yet the State of Maine actively trained and equipped fishermen to disentangle minke whales in state waters. The commenter believes that for the State of Maine to go to such lengths indicates that these protected species do become entangled at a significant rate and that those whales should be considered under the plan.

Response: The ALWTRP is designed to protect right whales, humpback whales, and fin whales. Right, humpback, and fin whales are strategic stocks because they are listed as endangered under the ESA. Therefore, because these strategic stocks interact with Category I and II fisheries, under the MMPA, the ALWTRP was established to assist in the recovery of these large whale species. Minke whales are neither listed as endangered or threatened under the ESA, nor do they have high incidental mortalities relative to population abundance. Therefore, minke whales are not considered a strategic stock and are not included within the ALWTRP. However, the ALWTRP does provide ancillary benefits to the minke whale. The minke disentanglement program is a component of the Maine's Large Whale Conservation Program whereby only a few commercial fishermen are trained and authorized to respond to entangled minke whales. The program was not developed because of increased takes of minke whales within state waters.

Comment 26: Several commenters expressed concern for minke whale regulations under the ALWTRP. One commenter believes the potential biological removal (PBR) for minke whales may be exceeded based on the fact that half of the whales stranded between Maine and Virginia (2002-2004) showed signs of fishery interactions. Another commenter requested that the minke whale stock be considered "strategic" under the ALWTRP and for NMFS to continue current take reduction measures for the species. The commenter stated that the status of minke whales in Atlantic waters is poorly known with more fishery interactions occurring than that which is reported. The commenter states that minke whales are found dead 2 and a half times more than all other species combined. Another commenter stated that the Large Whale Entanglement Report suggests high entanglement–related mortality. Two commenters stated that minke whale carcasses may be less likely to float after death, thus underestimating serious injury and mortality.

Response: Stranding data alone do not provide a reliable base to estimate PBR and currently, there is no accurate method to extrapolate further from stranding data. Minke whales are neither listed as endangered or threatened under the ESA, nor do they have high incidental mortalities relative to population abundance. Therefore, minke whales are not considered strategic and are not included within the ALWTRP. However, the species will still benefit from ALWTRP regulations, see responses to Comments 4, 25, and 299. It should be noted that minke

whales are the most common species of baleen whales found in western North Atlantic waters; estimates suggest that there may be four times as many minke whales in these waters as there are humpback whales. High overall minke whale abundance may account for the high incidence of carcass recovery. Also, there is no current data to either suggest or support that minke whales are less likely to float after death when compared to other large whale species such as humpback and fin whales.

Comment 27: Numerous commenters believed there was a lack of discussion in the EIS regarding how these measures will be enforced. One commenter further encouraged NMFS to make monitoring and enforcement plans a formal part of a take reduction plan.

Response: At its April 2003 meeting, the ALWTRT recommended that NMFS establish a Compliance Committee to discuss issues such as evaluating, monitoring, and improving ALWTRP compliance. The plan development includes working through the Atlantic States Marine Fisheries Commision (ASMFC) and Joint Enforcement Agreement (JEA) contacts and involves stakeholder groups on the ALWTRT. NMFS has made some progress regarding this issue, particularly with NMFS and state enforcement offices through the JEA process. However, NMFS acknowledges more work is needed in this area. At its 2004 and 2005 meetings, the ALWTRT also discussed separating monitoring issues from the Compliance Committee and addressing these through a Status Report Subcommittee. The discussion focused on the interpretations of the annual right whale and humpback whale scarification analysis. Specifically, the ALWTRT discussed whether the scarification analysis was the best method for evaluating the ALWTRP. NMFS has and intends to continue these discussions with the ALWTRT.

Comment 28: One commenter asked why vertical lines were not addressed in the DEIS. One commenter believed that the key elements of a vertical line strategy could have been articulated in the DEIS without committing at this time to specific alternatives.

Response: The proposed changes to the ALWTRP include some gear modifications to vertical line and the DEIS includes a discussion of vertical lines. Specifically, the DEIS notes that further risk reduction to address risk associated with vertical line will occur through a future rulemaking action due to the need for additional information and discussions to develop comprehensive and effective management measures. NMFS and its partners (e.g. scientific, state, and industry) are currently researching ways to reduce risk associated with vertical line. NMFS and its partners are also investigating how whales utilize the water column, including their foraging ecology and diving behavior, which will help to determine appropriate mitigation strategies to reduce entanglement risk of vertical line. NMFS has developed a list of potential management options to reduce risk associated with vertical line that was provided to the ALWTRT at its 2005 and 2006 meetings. NMFS discussed these options with the ALWTRT during the 2006 meeting and intends to further discuss these at the next meeting.

Comment 29: One commenter stated that the agency is balancing the desires of the industry with the needs of conservation and the commenter states this is not appropriate. The

commenter says that the ESA is quite clear that the needs of the species outweigh economic impact. The commenter prefers NMFS to require the institution of the more risk-averse groundline profile immediately. It should be coast-wide and year-round, because whales do wander.

Response: NMFS believes it is implementing the appropriate measures to reduce risk associated with groundlines, amongst other risk reduction measures, as quickly as is feasible and consistent with the requirements of the ESA. NMFS believes a phase-in period is warranted to enable fishermen to rig their gear with sinking and/or neutrally buoyant groundline, but believes fishermen will be continually converting their gear before the effective date, which will result in risk-reduction to large whales. Additionally, NMFS believes that the coast-wide management approach, with year-round requirements in the northeast, and seasonal requirements in the mid and south Atlantic, is risk-averse. Although whales may be present outside a seasonal window, the sightings are rare and the risk of gear to large whales at these times of the year is minimal. However, NMFS will continue to monitor the areas where seasonal requirements are in effect. Should new information become available that indicates that a change in seasonal window is warranted, NMFS will share the information with the ALWTRT and take appropriate action.

Comment 30: Several commenters believe NMFS failed to hold hearings in jurisdictions or locations where groups other than the industry could be heard. One commenter requested that the public comment period on the DEIS be extended even further, or a supplemental EIS be issued with additional hearings held in Metropolitan areas so interested public, advocacy groups, and the scientific community can take part.

Response: NEPA provides opportunities for public involvement at various stages of the environmental review process. NMFS held scoping meetings and public hearings on the DEIS from Maine to Florida. NMFS chose areas and locations that were most affected by the action. NMFS also solicited public comment through three open comment periods where comments could be submitted to NMFS in writing. NMFS provided an opportunity for the public to comment during the publication of its Notice of Intent (NOI) to prepare a DEIS (68 FR 38676, June 30, 2003), the notice of availability for the DEIS (70 FR 9306, February 25, 2005) and the proposed rule (70 FR 35894, June 21, 2005) . The public comment period of the DEIS was originally 45 days (70 FR 15315, March 25, 2005), but was extended to 81 days while the public comment period on the proposed rule was extended from 31 to 63 days (70 FR 40301, July 13, 2005). A summary of all scoping comments and copies of all written DEIS comments received by NMFS are found in the FEIS. NMFS believes that it has selected appropriate areas for its public hearings and provided adequate opportunity for public comment.

Comment 31: One commenter recommended NMFS prepare a supplemental DEIS to consider alternate time/area fishing closures in areas where right whales and other large whales congregate, such as critical habitat. Another commenter recommended that NMFS develop a supplemental DEIS to discuss available information on the frequency of vertical line entanglements that involved weak links. The commenter believes that results of this analysis should be used to estimate whether, and to what extent, weak links will reduce the number of

entanglements under each alternative.

Response: NMFS believes that the DEIS represents a comprehensive suite of alternatives to amend the ALWTRP as well as a thorough analysis of the impacts of the proposed alternatives on the human environment. NMFS worked with the ALWTRT to help evaluate the ALWTRP and discuss additional modifications necessary to meet the goals of the MMPA and ESA. NMFS also solicited input from the public after issuing a Notice of Intent to prepare an EIS. Although there were no consensus recommendations from the ALWTRT or consistent proposals from the public, NMFS believes that it has developed the best options available for amending the ALWTRP. NMFS did consider seasonal closures to prohibit lobster trap/pot and gillnet fishing in all designated right whale critical habitats during times when whales are known to congregate in those areas. This discussion is included in the DEIS summary of written scoping comments received. This comment is reflected in the section of the DEIS that lists the alternatives considered and rationale for rejection, as well as in the section that describes the alternatives considered. In the FEIS, NMFS included additional language to clarify that this comment was considered. NMFS has analyzed all entanglements including those that involve weak links. Although weak links are one gear modification that is included in the current ALWTRP, as well as a component of the broad-based gear modifications in the DEIS, NMFS is not relying solely on this modification. There is no evidence to suggest that weak links are ineffective. NMFS believes weak links, in combination with other mitigation measures, serve as a valuable conservation tool.

Comment 32: One commenter stated that the Southern monkfish area is not overfished and is not deemed overfished and this should be fixed in the DEIS.

Response: Monkfish has been determined by NMFS to not be overfished in both the northern and southern areas from 2003 through 2005. The NEFSC held a monkfish stock assessment workshop in the fall of 2004 (SAW 40). The data used in the 2004 assessment included NEFSC research survey data, data from the 2001 and 2004 Cooperative Monkfish Surveys, commercial fishery data from vessel trip reports, dealer landings records, and observer data. The Stock Assessment Review Committee concluded that the resource is not overfished in either stock management area (north or south). Chapter 4 of the EIS discusses the status of affected fisheries and does not indicate that monkfish are overfished. Therefore, NMFS agrees with the comment that monkfish is not overfished in the southern area as of December 31, 2005. NMFS has changed the FEIS to reflect this, but has noted that new information (New England Fishery Management Council (NEFMC and NEFSC 2006 Monkfish Monitoring Report)) finds that monkfish are now overfished in both the northern and southern areas. In the monkfish Management History section of Chapter 9 of the EIS, the discussion has been updated to reflect the latest assessment of the fishery's status.

Comment 33: One commenter states ship strike mortalities are not covered in the DEIS.

Response: Section 118 of the MMPA requires that take reduction teams address serious injuries and mortalities of marine mammals that interact with commercial fishing operations.

The DEIS is focused on serious injuries and mortalities of large whales that result from entanglements in commercial fishing gear. However, NMFS did consider ship strike mortality as part of the cumulative effects analysis in Chapter 9 of the DEIS.

Comment 34: One commenter wants NMFS to consider the importance of the DEIS as NMFS balances the survival of right whales against development and commercial interests that can be modified while still profitable. The commenter believes that development and commercial interests can be done in an environmentally friendly and commercially viable way. The commenter also believes that it is the North Atlantic right whale that may not survive without NMFS' strong protection.

Response: NMFS acknowledges the commenter and believes that the DEIS represents a comprehensive suite of alternatives that has thoroughly analyzed the impacts of the proposed alternatives on the human environment and large whales, including right whales, as well as other marine mammal species.

Comment 35: One commenter states that Exhibit 6-6 identifies potential sources of increased gear loss, but there was no specific analysis for gear loss in rocky/tidal habitats. Further, there is no analysis for the concept of low profile groundline in the potential reduction of gear loss rates. The commenter states that Exhibit 6-8 states the estimated change in annual gear loss for Maine inshore waters in Alternatives 2-4 and 6 will increase by 10-percent; the commenter states that anecdotal information says this is a very low estimation.

Response: As noted in Exhibit 6-6, the EIS acknowledges that gear loss may be higher in certain waters such as rocky bottom areas. Consequently, the analysis of changes in gear loss rates separately examines Maine's inshore fishery and applies the higher rate of 10 percent. This value represents an estimate of the typical change in gear loss rates for Maine inshore waters; NMFS acknowledges that some fishermen will likely experience higher rates while others will likely experience lower rates.

NMFS and its partners are actively researching the use of low profile line in rocky/tidal habitats to minimize gear loss; however, additional research is required before NMFS can determine whether use of this gear is feasible. See response to Comment 128.

Comment 36: One commenter believes that Exhibit 6C-1 does not seem to account for the useful life of sinking line in rocky/tidal habitats.

Response: The analysis assumes that the useful life of sinking and/or neutrally buoyant line will be lower, on average, than the useful life of floating line. This assumption is based in large part on recognition that the line is more susceptible to chafing, particularly in rocky or heavy tide habitats. Adjusting estimates of the line's useful life to take local conditions into account would introduce a level of detail into the analysis that is infeasible.

Comment 37: One commenter believed that the ESA is relatively blind to costs of the reasonable and prudent alternatives of a biological opinion if the species is in jeopardy.

Response: Regulations implementing section 7 of the ESA define the criteria for reasonable and prudent alternatives (RPA). RPAs must be technologically and economically feasible. The ALWTRP is promulgated under the MMPA. Pursuant to NEPA, NMFS analyzed the social, biological, and economic impacts of the various ALWTRP alternatives on the human environment.

Comment 38: One commenter suggested developing a new approach to eliminate all takes, such as real-time right whale tracking, improved reporting of location and amount of gear in the water, mandatory gear marking, and effective area closures for trap/pot and gillnet gear.

Response: The ALWTRT has discussed many of the commenter's concepts in the past. Several of the commenter's ideas are currently being pursued by NMFS and the ALWTRT. However, a couple of these concepts need further development. In particular, real-time right whale tracking has several limitations both from a technical and legal standpoint. Monitoring the location and volume of gear in the water is also very challenging. Nonetheless, these ideas have some merit and NMFS will continue to discuss these issues with the ALWTRT.

Comment 39: A few commenters believed that there are generally no whales beyond 4-6 miles (7.4-11.1 km) offshore, so the eastern edge of the ALWTRP line off of Florida should not be extended to the Exclusive Economic Zone (EEZ). Another commenter said that fisheries in the Southeast occur greater than 3 nautical miles (5.6 km) from shore, but most whales are inside of 3 nautical miles (5.6 km) and in temperatures greater than 70° F (21.1° C) where most fisheries do not occur.

Response: Habitat models based upon the aerial survey data collected off the southeast suggest a strong relationship between the spatial distribution of calving right whales, water temperature, and bathymetry. In particular, calving right whales were strongly correlated with water temperatures between 55.4-59° F (13-15° C) and water depths 49.2-65.6 ft (15-20m) (Keller *et al.* 2006, NMFS unpublished 2006). However, southeast spatial distributions and habitat correlations for other large whale species remain unclear at this time. Sightings data from the North Atlantic Right Whale Sightings Database suggest that right whales, and other large whale species, do occupy waters greater than 3 nautical miles (5.6 km) from shore. However, given the lack of offshore survey effort in this region, it is possible that there are more large whales in this area than reflected in the database. Thus, NMFS has extended management measures out to the eastern edge of the EEZ to protect any large whales in this area, but also to remain consistent with management areas extending to the EEZ in Mid-Atlantic and Northeast waters.

Comment 40: One commenter said that there is little effort in the shark gillnet fishery in the Southeast and this should be acknowledged.

Response: NMFS acknowledges that gillnetting effort in the Southeast does not meet or exceed gillnetting levels in the Mid-Atlantic or Northeast.

Comment 41: NMFS received many comments supporting year-round, coast-wide gear modifications. Comments supporting this idea included the following rationale: (1) Right whales and humpback whales have been seen as far south as the Carolinas or even farther south all year long (e.g., humpback whales documented feeding off North Carolina in June 2004); (2) fin whales have been documented in the Mid-Atlantic from January through March; (3) seasonal exemptions seem linked to survey effort (i.e., there is little winter/early spring survey effort in southern areas); (4) documented sightings of large endangered whales off New Jersey (within 20 mile (37.0 km) radius of Cape May) in summer; (5) stranding/ship strike data show whales using waters south of Rhode Island in summer; (6) Mate data (Mate et al., 1997) show right whale mother/calf off New Jersey in August of 1997; (7) humpback whale strandings in Virginia and North Carolina have been recorded in summer; and (8) large whale movements are unpredictable (e.g., Kingfisher went from the southeast to New England and back again in a few weeks), therefore, NMFS should consider updated satellite tracking information (Baumgartner and Mate, 2005). One commenter questioned the sighting effort for right and humpback whales in the Mid-Atlantic during the late spring/summer and suggested increased effort in this area; in the interim, the commenter supported year-round requirements in the Mid-Atlantic.

Response: NMFS has based its regulations on the best available data and has considered and incorporated all sources of available data (e.g., satellite tracking papers) into this final rule and the FEIS. NMFS recognizes that animals occur in Mid-Atlantic waters outside seasonal management periods, however, sightings referred to in the above comments are not typical of the known ecology of large whales. Expanding seasonal measures to year-round, coast-wide modifications would only offer minimal risk reduction for large whales in comparison.

Comment 42: One commenter stated that whale watch boats operate in the Mid-Atlantic from April 1 through November 30. The commenter believes that if the numbers of whales were expected to be low from May 31 through September 1, whale watch boats would not operate during this time.

Response: Many Mid-Atlantic whale watching operations conduct tours for dolphins and other cetacean species. However, NMFS currently does not possess data on where such vessels are traveling or what type of marine mammals they are observing. Data that are available to NMFS at this time show a low sightings record of large whales in the Mid-Atlantic from June 1 through August 31. NMFS is not opposed to receiving new information on large whales in this area and would welcome sightings and effort data from Mid-Atlantic whale watching vessels.

Comment 43: One commenter said that he takes sea-sampling observers out everyday and is willing to take someone with him if it would help determine if whales are there.

Response: NMFS appreciates the support and assistance being offered by this commenter. Sea-sampling observers do collect large whale sightings data, however, this is one of many data collection responsibilities. If a right whale is sighted, the sighting is entered directly into the SAS Right Whale Reporting System. However, broad-scale surveys are the best source of information on the spatial and temporal distribution of large whales.

Comment 44: One commenter said that humpback whales can be consistently found in the Gulf of Maine during a longer period (April-December) than indicated in the DEIS. The commenter also believed that data presented were obtained by analysis of a right whale sightings database with opportunistic data for other large whale species. The commenter said that humpback whales have different ecological characteristics than right whales and do not use the same feeding habitats concurrently. The commenter believed that opportunistic sightings data may not paint a representative picture of the spatial and temporal distribution of humpback whales.

Response: NMFS has modified the FEIS to reflect this comment. However, NMFS did not analyze opportunistic sightings data only when analyzing the distribution of other large whale species. Systemic sightings data (e.g., NMFS survey data),are incorporated into the NARWC Database (curated by URI). These aerial and vessel surveys are conducted throughout the Atlantic coast, and although many surveys are focused on right whale documentation, many other surveys are conducted to sight and record the location of other large whale species or marine mammals.

Comment 45: One commenter believes whales that get entangled are sick, which inhibits their ability to navigate around gear. The commenter further believes whales get entangled in ghost gear (e.g., trailing lines and refuse).

Response: Currently there is no data to support this hypothesis. Scarification analyses indicate a large percentage of whales interact with fishing gear, with most surviving these encounters. Also, at this time, NMFS cannot state conclusively that whales are becoming entangled in ghost gear.

Comment 46: One commenter wanted to know if the economics and technological feasibility of implementation had been considered.

Response: The specific meaning of the "economics and technological feasibility of implementation" is unclear. The commenter may refer to the public sector cost of administering and enforcing the proposed rules; such an analysis is not required in an EIS. Alternatively, the commenter may be referring to the economic impact of the proposed alternatives on the fishing industry, a subject addressed extensively in the EIS. Chapter 6 estimates per-vessel and industry-wide incremental costs for affected fisheries. Chapter 7 considers the socioeconomic impact of the alternatives, i.e., what geographic areas are most affected and will the regulations affect the economic viability of fishing operations. Furthermore, the regulatory flexibility analysis (Chapter 11) focuses on the implications of the rules for small business.

1.12 General Comments on Proposed Alternatives

Comment 47: NMFS received many comments stating that none of the proposed alternatives would sufficiently protect large whales for several reasons that include: (1) The

proposed regulations will not achieve PBR; (2) the proposed actions may not achieve the goals of the MMPA; and (3) proposed regulations need to be strengthened, as it is NMFS' mandate under the ESA.

Response: NMFS disagrees with the commenters' assessment that none of the proposed alternatives would sufficiently protect large whales. NMFS believes that the EIS represents a comprehensive suite of alternatives to amend the ALWTRP as well as a thorough analysis of the impacts of the proposed alternatives on the human environment. NMFS worked with the ALWTRT to help evaluate the ALWTRP and discuss additional modifications necessary to meet the goals of the MMPA and ESA.

Comment 48: Numerous commenters stated that more time is needed to evaluate whether the current plan is working. Many believed that other ALWTRP measures (i.e., weak links, critical habitat closures, buoy modifications, and limited time-area closures) should be properly evaluated to determine their effectiveness before implementing a prohibition on floating groundlines.

Response: Since right, humpback, and fin whales are listed as endangered species under the ESA, they are considered strategic stocks under the MMPA. In response to its obligations under the MMPA, NMFS established the ALWTRT to develop a plan for reducing the incidental take of large whales in commercial fisheries to below the PBR. PBR for right whales is set at zero. Consequently, if any right whale is entangled in commercial fishing gear that has been determined to be from the sink gillnet or pot/trap gear, NMFS must take additional action to protect right whales. Additionally, in response to the serious injury and mortality of large whales in commercial fisheries exceeding PBR, NMFS needs to take additional action in response to its requirements under the MMPA.

Comment 49: Some commenters stated that until research shows how, when, and where whales become entangled in fishing gear, none of the alternatives should be implemented. One commenter believes research is needed regarding where and when whales are most at risk. Otherwise, the commenter believes a new management plan may be ineffective to protect whales, while also causing economic hardship to fishermen. The commenter believes new rules must be based on the most recent data and build in flexibility to generate new data for consideration.

Response: The FEIS notes that entanglements of large whales are still occurring in sink gillnet and trap/pot gear and highlights the legal mandates of the MMPA and ESA that NMFS is required to follow. Based on the continued serious injury and mortality of large whales due to entanglement in these gear types, NMFS must take action to provide more protection to large whales. Although NMFS acknowledges a need for more scientific information, NMFS is required to take action based on the best information that is available when developing the EIS. As new information becomes available regarding large whales, entanglements, or commercial fishing gear modifications NMFS will share this information with the ALWTRT to determine if additional changes to the ALWTRP are warranted.

Comment 50: Several commenters urged NMFS to develop whale rules with as much flexibility as possible, allowing for innovations to be implemented as they are developed. One commenter believes that as NMFS constructs the final rule for this Plan, the agency should adopt a flexible and adaptive approach, and continue refining the regulations on a region-by-region basis. The commenter also believes that, considering our limited understanding of large whale ecology across diverse habitats, as well as the variability among the dozens of different fixed gear fisheries along the Atlantic seaboard, the Plan must be flexible and responsive to changing ecological and economic conditions over time.

Response: NMFS acknowledges this very important comment and will continue to work with the ALWTRT and with its legal mandates and requirements to help facilitate better flexibility within the ALWTRP regulations. NMFS has developed and implemented flexible regulations in the past, but learned that the mandates and requirements that NMFS must follow limited NMFS' flexibility and ability to react quickly. In addition, in many instances, NMFS is also limited by the lack of information available to implement flexible regulations. NMFS will continue to explore the concept of flexible rulemaking with the ALWTRT.

Comment 51: One commenter stated that the 2001 biological opinions on the American Lobster, Multispecies, Spiny Dogfish, and Monkfish FMPs make clear that unless the agency identifies an alternative that would eliminate entanglement and ship strikes, the alternative is unlawful.

Response: The 2001 Biological Opinion included a n RPA composed of several measures that were subsequently incorporated into the ALWTRP. The Biological Opinion also included criteria to monitor the RPA's effectiveness. The RPA and monitoring criteria are based solely on right whale entanglements with commercial fishing gear not ship strikes. Ship strikes are evaluated through a separate action in support of the implementation of the national right whale ship strike strategy. At that time, the 2001 Biological Opinion concluded that the RPA was sufficient to allow the commercial lobster trap/pot fishery to continue. However, since that time NMFS has reinitiated consultation on the continued implementation of the American lobster fishery in federal waters based on new information on the effects of the fishery on right whales. This consultation is on-going. NMFS will consider changes to the ALWTRP during consultation on the American lobster fishery.

Comment 52: One commenter asked how many lethal takes are expected to occur under the status quo and how many lethal takes are expected to occur under each alternative.

Response: It is difficult to predict how many lethal takes are expected to occur under each alternative. The evaluation of the impact of regulatory changes on whale entanglement risks is largely qualitative. This approach is necessary because models that would enable NMFS to conduct a rigorous quantitative assessment of such risks are currently unavailable. The primary threat that commercial fishing poses to large whales is the risk of incidental entanglement in commercial fishing gear. The regulatory changes under consideration are designed to reduce harm to large whales by reducing the likelihood of entanglement and/or

reducing the severity of an entanglement should one occur. NMFS seeks to achieve these objectives through a combination of two general measures: (1) Gear modification requirements; and (2) restrictions on fishing activity at specified locations and times. Chapter 5 of the EIS examines the impact of these measures on whale entanglement risks.

Comment 53: Several commenters disagreed with NMFS' conclusion that gear modifications were necessary for tended and/or actively fished net fisheries.

Response: NMFS specifically requested public comment on whether gear modifications were warranted for gear that is tended and/or actively fished. NMFS is not implementing the proposed weak link requirement for tended driftnet gear at this time due to potential safety issues that were raised. Thus, NMFS believes further research on this fishery, and specifically testing weak links in drift gillnet gear, is needed before weak links should be required.

Comment 54: One commenter suggested the alternatives should be harmonized with other federal mammal protection plans (e.g., the bottlenose dolphin protection plan) to prevent the possibility of creating several plans each with their own unique requirements.

Response: Chapter 9 of the EIS includes a cumulative effects analysis that examined the impacts of this action in conjunction with other factors that affect the physical, biological, and socioeconomic resource components of the affected environment. The purpose of the cumulative effects analysis is to ensure that Federal decisions consider the full range of an action's consequences, incorporating this information into the planning process. The cumulative effects analysis studies the impacts of the regulatory alternatives to other federal marine mammal take reduction plans and fisheries management plans within the context of other past, present, and reasonably foreseeable future actions.

Comment 55: Several commenters believed that the proposed rule should not apply to Florida gillnet fisheries for several reasons: (1) Some non-shark fisheries currently use rope that has a breaking point of 800 lb (362.9 kg), well below the 1,100-lb (499.0-g) weak link breaking point indicated in the take reduction plan; (2) night fishing is allowed only if strike nets are deployed (strike nets are set in a circle and sink two to five feet (0.6 to 1.5 m) below water; the net is then retrieved); (3) anchored gillnets are not used by Florida fisheries; (4) sinking or neutrally buoyant line is already used on buoys; and (5) gillnets are always tended (i.e., within eyesight of fishermen).

Response: On January 22, 2006, a dead right whale calf was found floating off Jacksonville, Florida. NMFS determined the mortality occurred as a result of entanglement in gillnet gear allowed to be used in the Southeast U.S. Restricted Area during the restricted period. Thus, NMFS implemented, with revisions, previous ALWTRP regulations (50 CFR 229.32(g)(1) and (2)) by expanding the Southeast U.S. Restricted Area to include waters within 35 nm (64.82 km) of the South Carolina coast, dividing the Southeast U.S. Restricted Area into Southeast U.S. Restricted Areas North and South, and modified regulations pertaining to gillnetting within the Southeast U.S. Restricted Area. That action occurred under a separate rule making published in

the *Federal Register* on June 25, 2007 (72 FR 34632). Thus, this final rule is retaining those restrictions for the Southeast U.S. Restricted Area.

Comment 56: One commenter supports the implementation of a pre-1997 status quo.

Response: A pre-1997 status quo option was not analyzed in the DEIS. Section 118 of the MMPA requires that NMFS reduce bycatch of strategic marine mammal stocks incidentally taken during commercial fishing operations. The level of documented serious injury and mortality of right, humpback, and fin whales due to entanglement in fishing gear required NMFS to convene a take reduction team and develop a take reduction plan to protect these whales. This final rule implements modifications to the ALWTRP, which are necessary because NMFS has evidence that serious injury and mortality in commercial fishing gear is still occurring at unsustainable levels.

1.1.3 Comments Specific to Each Alternative

Comment 57: NMFS received numerous comments in support of Alternative 1. Commenters believed NMFS has not provided data to show there is a problem that warrants amending the current ALWTRP. Other commenters thought existing regulations have not been given enough time to work. One commenter also said that economically, in today's dollars, it would probably cost $8,000 to replace groundline as proposed in the other alternatives, and the way that the material is increasing in price, costs could be greater than $10,000 by 2008.

Response: NEPA requires NMFS to analyze a no action alternative (Alternative 1). NMFS did not choose to finalize this alternative because it does not adequately protect large whales, and therefore, does not satisfy the requirements of the MMPA or ESA. Due to the endangered status of the North Atlantic right whale population, there is a need to further reduce serious injury and mortality. NMFS has determined that the additional regulatory measures included in this action are necessary to meet the objectives of the ESA and the MMPA. The ESA requires that NMFS ensure that activities it authorizes, including commercial fishing, do not jeopardize the continued existence of endangered and threatened species. The MMPA provides that the immediate goal of a take reduction plan is to reduce incidental mortality and serious injury of marine mammals taken in the course of commercial fishing to levels less than the PBR level and the long-term goal is to reduce such incidental mortality and serious injury to insignificant levels approaching a zero rate. These regulatory changes are necessary to attain these goals.

The costs associated with converting to sinking and/or neutrally buoyant groundline will vary by vessel, depending on the quantity of gear fished. The $8,000 to $10,000 range specified by the commenter may be valid for certain vessels. In the FEIS, gear replacement costs have been revised to incorporate up-to-date data on key inputs such as groundline. Chapter 7 of the EIS identifies vessel segments that may be heavily impacted by comparing average vessel revenues with compliance costs. The analysis suggests that under Alternative 6 Final (Preferred), a limited number of small vessels are most at risk. Although costs are high for some vessels, NMFS made modifications to the final rule, based on public comment, to decrease costs

where possible while still meeting its goals under the MMPA and ESA (see Changes from the Proposed Rule section of the preamble). While these vessels may still realize high costs relative to revenues, fishermen have some options to try to mitigate the costs. For example, the impacts of converting to sinking and/or neutrally buoyant groundline may be defrayed, in part, by current and future groundline buyback programs operated by NMFS and other partners. In addition, although the requirements under Alternative 6 Final (Preferred) may impose significant costs within the first year after publication of the final rule (to convert all groundline to sinking and/or neutrally buoyant groundline), fishermen may be able to distribute the cost of the new gear over its useful life by seeking a loan. After the first year, ongoing costs would be significantly lower as fishermen would only need to replace worn-out and lost gear.

Comment 58: NMFS received a comment opposing Alternative 1.

Response: NMFS agrees with the commenter (see Response to Comment 57).

Comment 59: One commenter supports Alternative 1 until the shipping industry and Navy have been regulated so their take is considerably less than it is now.

Response: NMFS recognizes that other marine resource users such as the shipping industry and the US military are impacting large whale species, and NMFS is simultaneously pursuing various regulatory and non-regulatory means of addressing the ship strike issue (see response to Comment 279). However, serious injury and mortality to large whales due to entanglement continues to occur under the current regulations, and as such, NMFS must continue to address the impact by modifying the ALWTRP as appropriate.

Comment 60: Numerous commenters expressed support for Alternative 2 stating that it is the only option that truly affords large whales protection from the risk of entanglement.

Response: Alternative 2 is the most conservative, risk-averse approach to the protection of endangered whales because it would require year-round use of low-risk gear along the entire Atlantic coast. However, based on the available sighting information the potential for entanglement of whales in the Mid-Atlantic or South Atlantic waters during summer months is minor. Therefore, the year-round requirements provided in Alternative 2 would likely offer a minimal risk reduction benefit relative to NMFS' preferred alternative, Alternative 6 Final, which incorporates seasonal requirements based on sightings data documenting the movements of large whales.

Comment 61: NMFS received several comments objecting to Alternative 2. In addition, one commenter proposed specific changes to Alternative 2 regarding the number of traps per trawl in specified areas.

Response: NMFS agrees with the commenters (see response to Comment 60). NMFS has reverted back to the status quo for the number of traps per trawl in specified areas.

Comment 62: Several commenters expressed support for Alternative 3. One commenter supported the alternative because it incorporates seasonal components. Another commenter would only support Alternative 3 if the Mid-Atlantic northern boundary was moved to the southern border of Delaware, in order to better protect whale habitat. Conversely, NMFS received many comments objecting to Alternative 3. One commenter believed its requirements may cause effort to shift into exempted areas. The commenter believes the line drawn from Watch Hill Point, RI (41° 18.2′ N. lat. and 71° 51.5′ W) south to 40° 00′ N. is arbitrary and not sufficiently protective of right whales, which have sometimes been seen west of 72° 00′ W. The commenter states that NMFS used sightings data to determine this line, but those data are not included in the DEIS. Further, the commenter believes a more regional management approach is prudent and suggested that NMFS analyze incorporating the "Middle Zone" boundary.

Response: The DEIS identified Alternative 3 as one of its preferred alternatives because of the risk reduction benefit of implementing broad-based gear modifications on a seasonal basis. NMFS did consider implementing Alternative 3 along with the commenters proposed change to the northern boundary of the Mid-Atlantic area. However, the available sighting information did not support the proposed change to the Mid-Atlantic boundary. At this time, NMFS considers waters south of Watch Hill Point, RI (41° 18.2′ N. lat. and 71° 51.5′ W) to have a seasonality for Atlantic large whales (e.g. migratory corridor). Although animals may be present in Mid-Atlantic waters outside the seasonal period defined in this final rule, recorded large whale sightings are rare at that time for waters south of Long Island Sound. Thus, moving the northern boundary of the Mid-Atlantic management area to the southern border of Delaware would not offer substantial risk reduction for large whales. However, NMFS will reconsider such measures if it receives additional data for such areas and seasons. In addition, NMFS believed that Alternative 6 also offered more immediate protection to right whales and identified this as the other preferred alternative in the DEIS.

NMFS recognizes that there have been sightings of right whales west of 72° 00′ W.; however, such events are uncommon. The seasonal variation in gear modification requirements is based on whale distribution data in NMFS' analysis of the NARW Sightings Database through early 2003, supplemented by additional data on humpback and fin whale sightings.

Comment 63: NMFS received several comments in support of and in opposition to Alternative 4.

Response: Alternative 4 is one of the more risk-averse approaches to the protection of endangered whales because it would require year-round use of low-risk gear from the coast of Maine through the South Carolina/Georgia border and seasonal restrictions off the coast of Georgia and Florida. However, based on sighting information, the potential for entanglement of whales in the Mid-Atlantic waters during summer months is low. Therefore, the year-round requirements provided in Alternative 4 for the waters off the Mid-Atlantic coast would likely offer a minimal risk reduction benefit relative to NMFS' preferred alternative, Alternative 6 Final, which incorporates seasonal requirements based on sightings data documenting the movements of large whales.

Comment 64: NMFS received many comments in support of Alternative 5. Most comments in support of Alternative 5 were from the commercial fishing industry from Maine. Many of these commenters supported Alternative 5 only if the status quo alternative (Alternative 1) could not be maintained. Others believed Alternative 5 best suited fishermen in Maine because Maine fishermen would only have to shoulder a small fraction of the compliance costs under this alternative as compared to the other alternatives. One commenter believed that Alternative 5 has the least impact on Maine fishermen while still meeting baseline whale protection goals of the ALWTRP. Two state representatives and several other commenters supported Alternative 5 as it did not prohibit the use of floating rope. Similar comments were also received from fishermen from the Mid-Atlantic and Southeast.

Response: As noted in the response to Comment 57, the status quo Alternative 1 does not adequately protect large whales resulting in NMFS determination that regulatory changes are necessary to attain the goals of the ESA and MMPA. Of the remaining alternatives considered, NMFS believed that Alternative 5 was the least conservative, risk-averse approach to the protection of endangered whales. Although the SAM area was proposed to be expanded beyond what is currently required, the use of low-risk gear (e.g. prohibition on floating groundline) was only required in a relatively small area along the entire Atlantic coast. Thus, NMFS believed Alternative 5 offered less protection to large whales compared to the final preferred alternative.

Most fishermen seemed to prefer Alternative 5 based primarily on economic impacts. By adopting Alternative 5, the cost of compliance would be shifted to fishermen who fish within the smaller SAM area. However, based on the available sighting information, NMFS believes the potential for entanglement of whales can occur outside of SAM areas. Although Alternative 5 produces the lowest economic effect to industry, it provides a lower risk reduction benefit compared to both the seasonal and area requirements provided under NMFS' preferred alternative, Alternative 6 Final, which is based on the movements and sightings of large whales.

Comment 65: The States of Connecticut and New York concurred with NMFS' determination that the proposed measures are consistent with the state's Coastal Zone Management (CZMA) Program, provided that NMFS exempt Lobster Management Area 6 (LMA 6) from the requirements of the ALWTRP. They noted that the available sightings information indicates that large whales do not frequent this area and there is a significant increase in the risk of gear loss. They further identified Alternative 5 as its first preference, but noted that should NMFS not select Alternative 5, that they would favor Alternative 6.

Response: NMFS reviewed the available sightings information within LMA 6 and determined that the potential for entanglement of whales is low in this area while the potential for gear loss is high. Therefore, NMFS has expanded the exemption line in Rhode Island sound to extend from Watch Hill, Rhode Island, to Montauk Point, New York. As noted in the response to Comment 64, NMFS believes Alternative 5 provides a lower risk reduction benefit compared to both the seasonal and area requirements provided under NMFS' final approved Alternative 6, which is based on the movements and sightings of large whales.

Comment 66: Several commenters objected to Alternative 5 stating that it is the least

protective alternative to protect large whales.

Response: Not including the status quo Alternative 1, NMFS agrees that Alternative 5 was the least conservative, risk-averse approach to the protection of endangered large whales and did not select this alternative in the final rule.

Comment 67: One commenter stated that Alternative 5 does not include a phase-in of gear modification requirements (i.e., there are no broad-based gear modifications outside of expanded SAM). The commenter believes that NMFS should justify this by showing the level of risk reduction for Alternative 5 with respect to other alternatives, or how risk reduction deficiencies would be compensated elsewhere.

Response: Chapter 5 of the EIS provides a detailed discussion of the risk reduction associated with Alternative 5 relative to the other alternatives. Consistent with the comment, Chapter 5 concludes that the absence of broad-based gear modification requirements in Alternative 5 would result in lower risk reduction benefits for large whales.

Comment 68: One commenter believes that if NMFS were to implement Alternative 5, SAM areas may be further expanded even more in the future.

Response: The SAM area developed in Alternative 5 was based on the best sightings information available. However, had NMFS selected Alternative 5, NMFS could have modified the SAM area through a separate rule if an expansion of the SAM area was warranted.

Comment 69: A commenter recommended that if Alternative 5 is selected it should be effective September 1 – March 31 in the Mid-Atlantic. The commenter pointed out that year-round closures are unnecessary in the Mid-Atlantic area (especially around New Jersey) since sightings of large whale tend to occur between January and March.

Response: Seasonal gear modifications for the Mid-Atlantic will be required from September 1-May 31, as defined in this final rule. At this time of year, large whales primarily occur and are still migrating from southern waters to northern feeding grounds (through April and May). NMFS believes that implementing regulations through March 31 would not offer adequate protection.

Comment 70: Several commenters believed that Alternative 5 was impracticable because it required 600-lb.(272.2-kg) weak links for vertical lines, which would snap in heavy tides and lead to more ghost gear (i.e., gear lost at sea).

Response: There is no 600-lb.(272.2-kg) weak link requirement for vertical lines. The 600-lb.(272.2-kg) weak link requirement is for flotation and/or weighted devices added to the vertical line. Due to results from load-testing analyses, NMFS believes these breaking strengths are appropriate.

Comment 71: NMFS received a few objections to Alternative 6; one commenter opposed Alternative 6 because of the seasonal component of the broad-based gear modifications. However, numerous other commenters expressed support for Alternative 6. One commenter asked that NMFS only apply Alternative 6 where whales have been sighted.

Response: NMFS believes that Alternative 6 (Final) offers the best risk reduction benefit to protect endangered whales because it requires the use of low-risk gear in areas and times shown to have a high abundance of large whales. Because of their migratory patterns, large whales are primarily present in Mid- and South Atlantic waters during particular months while they appear to be in New England waters on more of a year round basis. Alternative 6 (Final) requires low-risk gear on a seasonal basis for fisheries in the Mid- and South Atlantic while requiring low risk gear on a year round basis in the New England area.

1.1.4 Comments on Exemption Lines/Areas

Comment 72: One commenter believed exemption lines should be proposed by state governments.

Response: As part of the scoping process provided under NEPA, NMFS conducted several scoping meetings throughout the Atlantic coast. At each meeting, NMFS made available a scoping document that contained issues and options for modifications to the ALWTRP. The document contained a section concerning exemption areas and requested input from the general public, including state representatives on the ALWTRT, to identify exemption areas. The proposed exemption areas have been developed in response to requests from state fishery management agencies, as well as others, and are designed to ensure that the ALWTRP does not unnecessarily extend commercial fishing regulations to waters in which endangered or protected whales have been rarely, if ever, observed. However, partially based on the comments submitted by interested states, NMFS modified the proposed exemption areas. The "Changes from the Proposed Rule" section of the preamble discusses these exemption line changes. NMFS will continue to monitor all exempted areas, and encourage states to develop contingency plans in the event a large whale is sighted in such areas.

Comment 73: Many commenters supported using the International Regulations for Preventing Collisions at Sea (COLREGS) to base exemption lines. However, one commenter did not support using the COLREGS in Buzzards Bay and Long Island Sound and requested NMFS to review large whale sightings and reconsider these exemptions. Another commenter stated there is little evidence to support exempting Buzzards Bay and Cape Cod Canal from gear modification requirements because sightings data corroborate that whales do occur in both areas.

Response: NMFS reviewed the large whale sightings for Long Island Sound and has amended the proposed exemption line. The new exemption line runs from Watch Hill, RI, to Montauk Point, NY. Based on comments, NMFS will revert to the status quo exemption lines for Massachusetts, which includes Buzzards Bay. Thus Buzzards Bay will not have an exemption at this time. See response to Comment 77 for more specific information about

Massachusetts.

Comment 74: Many commenters believe that there need to be exemptions within 3 nautical miles (5.6 km). One commenter stated that the considered regulations seem unfair and unsafe for those fishing near the shore, where they said whales are not seen. Several other commenters believed that SAM areas should not exist inshore of 3 nautical miles (5.6 km) due to the fact that no whales have been seen within 3 nautical miles (5.6 km) of shore.

Response: NMFS has received many reports throughout New England and the Mid-Atlantic detailing numerous sightings of large whales within 3 nautical miles (5.6 km) of shore. Therefore, NMFS does not believe exemptions within the 3 nautical mile (5.6 km) line along the coast would provide adequate protection for large whales and is not appropriate at this time.

Comment 75: One commenter stated that NMFS has no means to require modifications if whale habitat use changes (e.g., if fisheries expanded to > 280 fathoms (512.1 m or 1,680 ft) or if right whale habitat use changes due to potential climatic shifts. Such changes could result in whales using proposed exempted areas, such as Delaware and Chesapeake Bays.

Response: Should new information become available that indicates that a change in the inshore or deep water exemption areas is warranted, NMFS will share the information with the ALWTRT and will take appropriate action.

Comment 76: One commenter believes the 280 fathom (512.1 m or 1,680 ft) groundline exemption should be flexible and revisited when the agency has more research information and sightings data.

Response: Currently available dive data suggest that large whales do not dive deeper than 280 fathoms (512.1 m or 1,680 ft). Data come from world-wide observations and are not limited to the Gulf of Maine. As with all exempted areas, if NMFS is presented with new information on the diving behavior of large whales along the east coast that calls the 280 fathom (1,680 ft or 512.1 m) depth level into question, then it will revisit regulations in waters greater than 280 fathoms (512.1 m or 1,680 ft) if necessary. See Comment 75.

Comment 77: Several commenters oppose the proposed exemption line for Massachusetts for the following reasons: (1) It would cause a safety issue as there are 8,000 recreational lobstermen in the state and enforcing ALWTRP requirements so close to shore could be dangerous; (2) the proposed area is too small to benefit fishermen; and (3) nearly all trap/pot fishermen who fish in the exempted area have received a 75-percent subsidy to convert to sinking groundline, therefore, exempting these areas would be difficult to explain and enforce.

Response: NMFS agrees with the concerns raised by the commenters and has disapproved the proposed expansion of the exemption line within Massachusetts state waters. Should new information become available to alleviate these concerns, NMFS in consultation with the ALWTRT, may take future action to modify the exemption line.

Comment 78: Numerous commenters expressed concern for exemptions in the area known as “the Race” in Connecticut and New York. The commenters suggested that waters west of a straight line drawn from Montauk Point, Long Island, to Watch Hill, Rhode Island (current Lobster Management Area 6 line), should be excluded from the proposed amended ALWTRP.

Response: Discussed in response to Comment 65, NMFS reviewed the available sightings information within LMA 6 and determined that the potential for entanglement of whales is low in this area while the potential for gear loss is high. The data revealed that large whales are rarely sighted near the mouth of Long Island Sound and there are no documented interactions between whales and fishing gear in this area. Upon further inspection NMFS found that this area falls on either side of the current exemption line and has exceptionally strong currents with varying depths and very rocky topography. This area also has high vessel traffic where gear loss is already common. NMFS believes that the use of sinking groundline and 600-lb (272.2-kg) weak links in this area coupled with the issues noted above would increase this gear loss and create a safety risk to fishermen. Consequently, NMFS has modified the exemption line in Long Island Sound to run from Watch Hill, RI, to Montauk Point, NY.

Comment 79: One commenter recommended that NMFS check the accuracy of Exhibit 6H-1. The commenter stated that Connecticut fishermen operate in waters other than Connecticut waters; they report commercial fishing activities outside of Connecticut waters to the CTDEP and they fish in the “Race” under New York non-resident commercial lobster licenses. The commenter believes the assumption in Exhibit 6H-1, that vessel activity for state-permitted vessels is equally distributed only within state waters, is not accurate. Also, the commenter believes Exhibit 6G-2 is not accurate because, although there are fishermen who operate in Connecticut waters inside Long Island Sound, which is exempted, there are also vessels that fish in the “Race” and are affected by ALWTRP requirements.

Response: NMFS recognizes that Connecticut lobstermen fish in New York State waters. The analysis of other trap/pot and gillnet vessels applies a broad assessment of licenses issued by New York that likely includes licenses to out-of-state vessels. NMFS acknowledges that Connecticut-based vessels that purchase trap tags from Connecticut may not be accounted for under Alternatives 2 through 6 Draft (in the DEIS). However, under the preferred alternative, Alternative 6 Final, the portion of waters referred to in this comment (the "Race") would be exempted from the proposed regulatory requirements. As a result, under the preferred alternative, Connecticut-based vessels operating in these waters would not be affected by the regulations.

The EIS acknowledges that fishing activity is not likely to be equally distributed throughout state waters. Data on the location of state-permitted vessel activity are unavailable; in lieu of better data, the analysis employs assumptions that provide a reasonable basis for estimating the number of affected vessels. To the extent that fishing activity is disproportionately concentrated in waters exempted from the requirements, fewer vessels than estimated in the EIS would be affected. Conversely, to the extent that activity is disproportionately concentrated outside of the exempted waters, more vessels than estimated in

the EIS would be affected.

Comment 80: One commenter wants LMA 2 to be exempt from any new regulations as no whales are seen in that area. Another commenter said that there is no Dynamic Area Management (DAM) density in Area 2, thus, the area should be exempt.

Response: LMA 2 is located in Southern New England nearshore waters, south of Cape Cod and off the southern coast of Rhode Island. Despite the fact that a DAM may not have been triggered in this area, NMFS sightings data indicate that right whales are occurring within LMA 2. Although sightings may not be numerous, right whales have been seen in these waters, including areas outside of Long Island Sound and Block Island. It should also be noted that DAM zones are a regulatory measure only intended for Northern right whales. Thus, a lack in DAM density is not a reliable indicator of whale distribution of other species, in general. Other large whale species covered under the ALWTRP that would not trigger a DAM are known to occur in this area.

Comment 81: One commenter believed that NMFS does not have a plan to deal with gear in exempted areas if and when right whales are reported in those exempted waters. The commenter stated that since 2002 it does seem that there have been a lot more of what is considered to be out of season/out of habitat sightings and there is no way for NMFS to deal with them.

Response: The changes to the exemption lines have been developed in response to requests from state fishery management agencies, as well as others, and are designed to ensure that the ALWTRP does not unnecessarily extend commercial fishing regulations to waters in which endangered or protected large whales have been rarely, if ever, observed and there is low risk. In developing the revised exempted areas, NMFS reviewed the available sightings information (including information since 2002) and right whale tracking information where available, and determined that the potential for entanglement of whales is low in these areas so that no changes to the exemption lines are needed, other than those modifications noted in this final rule. NMFS will continue to monitor all exempted areas, and encourage states to develop contingency plans in the event a large whale is sighted in such areas. Should new information become available that indicates that a change in the exemption areas is warranted, NMFS will share the information with the ALWTRT and will take appropriate action.

Comment 82: One commenter believes that the proposal to exempt inshore of the 50-fathom (91.4-m or 300-ft) curve to explore low profile groundline is inappropriate. The commenter states that this proposal would put whales at risk.

Response: The alternatives provided in the DEIS and proposed rule did not include a proposal to exempt inshore of the 50-fathom (91.4-m or 300-ft) curve to explore low profile groundline.

Comment 83: Several commenters believe that NMFS should analyze the 50-fathom

(91.4 m or 300 ft) curve in Maine as a line for delineating gear modification requirements (i.e., exempt inshore of 50 fathoms (91.4 m or 300 ft)). They believe this may protect right whales going to and from the Bay of Fundy while allowing operationally realistic risk reduction gear modifications.

Response: NMFS sightings data confirms the frequent occurrence of right whales in waters landward of the 50-fathom (91.4-m or 300-ft) curve (e.g. southern Maine), thus it would not be an appropriate exemption line.

1.1.5 Comments on Proposed Exemption Lines in Maine

Comment 84: One commenter said that if there is going to be an exemption line set, it should be based off LMA 1, which already has a line 40 miles (64.4 km) out. The commenter suggested using this line until research shows a problem inside the line. The commenter said the problem is not in the nearshore fishery where 95-percent of fishermen in the State of Maine are fishing.

Response: In developing potential changes to state exempted waters, NMFS reviewed the NARW Sightings Database from 1960 through mid-September 2005 containing dedicated survey effort and opportunistic sightings data, which is supplemented by additional data on humpback and fin whale sightings, sightings data collected from 2002 through 2006 through the NEFSC systematic aerial surveys and the Northeast U.S. Right Whale SAS, as well as a large whale sightings database compiled by Maine DMR, for data on right, fin, and humpback whale sightings from 1960 to 2002. The areas that would be newly exempted from ALWTRP requirements contained in this final rule include only those in which whales are only occasionally found and are at low risk, as suggested both by NMFS' review of the data and its current understanding of whale behavior. NMFS does not believe that regulating the waters that will be exempted from the ALWTRP would have a significant benefit to large whales. The sightings data do not support exempting state waters out to 40 nautical miles (64.4 km). Exempting this large of an area from ALWTRP regulations would likely have a significant, direct effect on large whales.

Comment 85: NMFS received numerous comments in support of using the Maine DMR's suggested exemption line.

Response: After re-examining the sightings information from the available data sources noted in the response to Comment 84 with respect to both NMFS' proposed and Maine DMR's suggested exemption lines, NMFS concluded that exempting areas inside the State of Maine's suggested exemption line will provide an adequate level of protection to endangered large whales. Thus, the final exemption line for the state of Maine will use the coordinates of the exemption line suggested by Maine DMR.

Comment 86: If NMFS retains the proposed exempted line, commenters asked NMFS to consider the exempted lines in Maine from headland to headland (e.g., Cape Small to Cape

Elizabeth and Two Lights) rather than using the COLREGS because this area would encompass the same bottom type and fishing patterns. In addition, one commenter also stated that there is no exemption proposed for Penobscot Bay.

Response: NMFS agrees with the commenters' concerns and will not use the COLREGS line in Casco Bay; instead the exemption line will run just outside Casco Bay by a line connecting a series of three buoys as indicated by Maine DMR's suggested exemption line, which will become the final exemption line for Maine through this final rule. Moving this exemption line from the COLREGS line to the line suggested by Maine DMR will not have great economic or biological impacts because there are few affected vessels and infrequent whale sightings. For exempting Penobscot Bay, NMFS' proposed exemption line incorporated three coordinates from Maine DMR's suggested exemption line to exempt the Penobscot and Blue Hill Bay areas. These coordinates will remain the same, as the exemption line suggested by Maine DMR will become the final exemption line for Maine through this final rule.

Comment 87: Several commenters suggested that NMFS consider extending the Maine state exemption line to the 3-nautical mile (5.6-km) line. Their reasons include high boating traffic during the summer resulting in increased gear loss and the lack of whale sightings within the 3 nautical mile (5.6 km) limit.

Response: NMFS believes that the area exempted under the Maine state exemption line contained in this final rule includes a significant portion of the area identified by the commenters as high vessel traffic areas. Consequently, the potential gear loss related to boat traffic in areas outside of the Maine exemption line will not have a significant economic impact to fishermen or create a significant ghost gear problem. As noted in the response to Comment 85, NMFS reviewed the available sightings information in conjunction with both NMFS' proposed and Maine DMR's suggested exemption lines, and is adopting the latter exempted line in the final rule. The available sightings information did not support extending the Maine state exemption line to the 3-nautical mile (5.6-km) line throughout the coast of Maine.

Comment 88: One commenter thinks NMFS did not use new satellite tracking data from Maine and instead relied on limited sightings data to develop exempted areas.

Response: The information used by NMFS to develop and finalize the state exemption areas was the best scientific information available. For the final exemption line, NMFS reviewed the available sightings database (from 1960 through mid-September 2005), large whale sightings data from 2002 to 2006 collected through the NEFSC's systematic aerial surveys and the SAS, as well as a large whale sightings database compiled by Maine DMR, for data on right, fin, and humpback whale sightings from 1960 to 2002. NMFS considered satellite tracking information that was contained within published papers to develop and finalize exempted areas. During the development of the exempted areas, NMFS considered the paper entitled, "Satellite-Monitored Movements of the Northern Right Whale" (Mate *et al.*, 1997). While finalizing the exempted areas, NMFS considered the previous paper in addition to the paper entitled, "Summer and fall habitat of North Atlantic right whales (*Eubalaena glacialis*) inferred from satellite

telemetry" (Baumgartner and Mate, 2005). NMFS will continue to monitor all exempted areas and should new information become available regarding the exemption areas, NMFS will share this information with the ALWTRT to determine if changes to the exemption areas are warranted.

Comment 89: Two commenters questioned the justification of the Maine exemption line. The commenters requested NMFS to consider additional tracking data (one commenter provided a graphic with the tracking data) based on two right whale sightings in Maine waters. One commenter asked NMFS to see if these whales are landward of the proposed exemption line. The commenter stated that documented movements of two whales in a small population suggest that Maine waters are used more frequently than we know; the other commenter also stated that entanglement risk still exists when there is a high concentration of gear and a low concentration of whales. Both commenters stated gear recovered from the right whales "Kingfisher" and "Yellowfin", with one commenter noting that "Kingfisher's" gear came from Maine.

Response: NMFS will consider tracking data, and any other new information that becomes available, and revisit exemption areas in Maine if necessary. NMFS considered the graphic provided by the commenter and notes that the two whales discussed in the comments were included in the Baumgartner and Mate (2005) paper that NMFS also reviewed. Additionally, as noted in the Final and Draft EIS, NMFS did consider published reports of tracking data (see response to Comment 88). As indicated in Mate *et al.* (1997), the accuracy of the whales' locations depends on the number and distribution of the transmissions received from the tags during a satellite pass. Based on the number of transmissions received from the tags during a pass, the locations of the whales as recorded by the satellite receivers may vary 150 to 1,000 meters from the whales' true locations (Argos, 1990, as found in Mate *et al.* 1997). Since the satellite data have levels of error, precise latitudes and longitudes are not generated by the tags; thus, it is difficult to determine exactly where these whales were sighted with respect to the final exemption line for Maine. Although the coordinates for the sightings were not provided, NMFS did review the available information and believes the final exemption line for Maine is appropriate.

Comment 90: One commenter cited Exhibit 6-10, which states that 50-percent of Maine's waters would be exempted under the proposed exemption line. However, lobster grounds are only a fraction of state waters and actual impact upon fishing effort would be greater and should be analyzed as such.

Response: The EIS acknowledges that fishing activity is not likely to be equally distributed throughout state waters. Data on the location of state-permitted vessel activity are unavailable; in lieu of these data, the analysis employs assumptions that provide a reasonable basis for estimating the number of affected vessels. To the extent that actively fished lobster grounds are disproportionately concentrated in waters exempted from the requirements, fewer vessels than estimated in the EIS would be affected. Conversely, to the extent that actively fished lobster grounds are disproportionately concentrated outside of the exempted waters, more vessels than estimated in the EIS would be affected.

1.1.6 Comments on Right Whale Critical Habitat

Comment 91: Due to limitations of available technology, particularly for vertical lines, two commenters recommended that NMFS adopt seasonal closures to prohibit all gillnet and lobster gear in all designated right whale critical habitats during times when whales are known to congregate in those areas until gear modifications that give reasonable assurance to prevent entanglement are developed. Two commenters urged NMFS to consider revising right whale critical habitat. One commenter suggested NMFS revise right whale critical habitat to include both SAM areas as well as the DAM areas that had been implemented through 2004. The other commenter suggested NMFS analyze all available right whale sightings data to reassess appropriate critical habitat boundaries that encompass high-use feeding and calving habitat.

Response: NMFS did consider adopting new seasonal closures in critical habitat areas in response to comments provided during the scoping process for the DEIS. This issue was included in the DEIS summary of written scoping comments received. The issue is addressed in the section of the DEIS that lists the alternatives considered and rationale for rejection (e.g., implement a gillnet closure in the Great South Channel Sliver Area from April 1 through June 30), as well as in the section that describes the alternatives considered (e.g., gillnet fisheries not currently regulated would be required to abide by current restrictions which include closures). In the FEIS, NMFS included additional language to clarify that this comment was considered but rejected.

There are currently closures in place to protect critical habitat. Contrary to the sentiments expressed by the commenters, NMFS is not relieving current restrictions in critical habitat areas. This is consistent with the Conservationist members' proposal provided at the 2003 ALWTRT meeting that, amongst other measures, critical habitat restrictions remain in place until vertical and groundline risks are reduced. In fact, Alternatives 2 through 6 in the DEIS considered that any gillnet and trap/pot fishery not regulated in these areas be required to abide by the current Critical Habitat restrictions (e.g., gillnet closure in Cape Cod Bay Critical Habitat Area from January 1 through May 15; trap/pot closure in Great South Channel Critical Habitat Area from April 1 through June 30). Additional closures to fisheries operating in Critical Habitat areas were not within the scope of the DEIS.

The preferred alternative in the FEIS takes a broad-based management approach by expanding the more protective gear modifications for lobster in Cape Cod Bay Critical Habitat, and lobster and gillnet gear for the DAM gear modifications coast-wide. Additionally, as discussed in the FEIS, NMFS believes that there is a need to re-evaluate whether critical habitat boundaries should be modified, and revisit the relationship between critical habitat and the ALWTRP before further changing current requirements in these areas. NMFS is currently taking a number of steps prior to deciding whether to propose any revisions to critical habitat, including an analysis of the following: (1) Southeast U.S. right whale distribution data in relation to bathymetry and sea surface temperature derived from Advanced Very High Resolution Radiometer imagery; and (2) characterizing the spatial and temporal distribution of zooplankton in the Northeast U.S. NMFS hopes to begin discussions with the ALWTRT regarding these critical habitat issues and their relationship to the ALWTRP in 2008.

1.1.7 Comments on Closed Areas

Comment 92: Several commenters urged NMFS to continue implementing closures given the uncertainty of gear modification effectiveness and until proven gear modifications are implemented. One commenter believes closures are needed for high-risk areas during peak right whale occurrence (this is in addition to critical habitat areas) and suggests removing gear from feeding/calving areas. In New England, the commenter suggested closing Cape Cod Bay to trap/pot fishing during peak months based on the best available data at the time (e.g., right whale surveys, prey abundance). Additionally, the commenter suggested closures in the Mid-Atlantic during migration (e.g., from the third week of February to the third week of March and mid-December to mid-January).

Response: NMFS considered the concept of a total closure to trap/pot and gillnet gear in unique "high risk" areas and determined that gear modifications developed through the ALWTRT process would result in more conservation benefits to the animals. The basis for this determination is two-fold. First, comments received from some ALWTRT members and the general public during the scoping and public hearing meetings stated that closures are not an economically feasible option for commercial fishermen given the uncertainty of right whale distribution patterns. Despite increased aerial survey effort, there is still a high degree of variability regarding right whale distribution. Generally, NMFS has a good understanding of when and where right whales will be in an area, but the size of the area and timing of when right whales enter these areas vary year to year. Fishermen could be closed out of a given area to protect right whales, but the whales might not yet be in that area. Similarly, the shift in effort to other areas may also be to areas where right whales are present.

Second, total closures refocus fishing efforts to other areas and may result in an edge effect where gear is concentrated around the periphery of a closed area, posing a greater risk of entanglement. NMFS believes that the gear modifications required in this final rule prevent entanglements where possible and will alleviate the threat of serious injury or mortality.

Comment 93: Several commenters stated that closures may not be very effective in light of right whale movements as indicated by satellite tracking data. Commenters state that closures may shift gear and effort to the edges of these areas (i.e. creating a "wall" of gear), thus increasing the entanglement risk for whales and placing gear where the whales feed and travel.

Response: NMFS believes that the gear modifications required in this final rule prevent entanglements where possible and will alleviate the threat of serious injury or mortality. However, if future serious injury and mortalities due to entanglements are proven to have occurred in high risk areas where gear modifications are in effect, or in critical habitat or restricted areas during the relative restricted periods from allowable gear, NMFS will consider closures for reducing the serious injury and mortality of large whales due to entanglements by requiring the complete removal of all trap/pot and/or gillnet gear. Absent such circumstances, NMFS will continue to work with the ALWTRT to monitor and modify fishing gear to adequately reduce the risk of serious injury and mortality of large whales.

Comment 94: One commenter requested that NMFS analyze the existing Western Gulf of Maine Closure that encompasses most of Jeffreys Ledge for potential inclusion as a year round modified gear area.

Response: The Western Gulf of Maine Closure and Jeffreys Ledge area are included in ALWTRP management areas. Modifications to these management areas were considered in Alternatives 2, 3, 4, 5, and 6 in the DEIS. The final rule requires year-round gear modifications in and around Jeffreys Ledge. See Chapter 3 section 3.1.7 of the FEIS or the "Changes to the ALWTRP for Gillnet Gear Requirements" section of this preamble for a complete description of the gear modifications required for this area.

Comment 95: Several commenters said that they supported changing the restricted period for the Southeast Restricted Area south of 29° 00′ N. from November 15-March 31 to December 1-March 31.

Response: Recent data indicate that right whales are rarely sighted south of 29° 00′ N in November or April. Consequently, NMFS has determined that a restricted period beginning on December 1 and ending on March 31 is appropriate for the Southeast Restricted Area N.

Comment 96: One commenter said that south of 29° 00′ N. the area should be opened due to a lack of whales in the area. One commenter said that NMFS should consider an area only 6 miles (11.1 km) from shore.

Response: Aerial survey and other sightings data indicate that right whales routinely move south of 29° 00′ N., particularly during January and February. Reviewing sightings data may suggest most/more whales occur within a few miles of shore; however, it is important to note that survey effort is biased toward shore (see Comment 39) and thus, whales farther from shore are likely undercounted.

Comment 97: One commenter suggested that 26° 46.5′ N. should be the southern boundary for Other Southeast gillnet waters.

Response: NMFS believes that 27° 51′ N. is the appropriate southern boundary for Southeast Atlantic gillnet fisheries under the ALWTRP. The line for operational restrictions is north of 27° 51′ N. for both Southeast Atlantic gillnet and trap/pot fisheries. Right whales are occasionally found in waters south of 27° 51′ N.; thus, observational requirements (e.g., VMS, gear marking) will be in effect under this final rule for the Southeastern U.S. Atlantic shark gillnet fishery from 27° 51′ N. south to 26° 46.5′ N. NMFS will continue to monitor this area from 27° 51′ N. south to 26° 46.5′ N. in the event that sightings data warrant the expansion of management areas or restricted time periods.

Comment 98: One commenter said that fishing practices south of 29° 00′ N. lat. off Florida are different from those north of this line for non-shark gear and this should be recognized in the regulations.

Response: NMFS agrees with the commenter and is aware that the Southeast U.S. Atlantic shark gillnet fishery is active primarily south of 29 00 N. lat. during the restricted period. Furthermore, NMFS is aware that the Southeast Atlantic gillnet fishery has been active north and south of 29 00 N. lat. during the restricted period and that, in general, fishermen are targeting Spanish mackerel with runaround nets south of 29 00 N. lat. and have used sink gillnets to target whiting north of 29 00 N. lat. For this reason, and due to the seasonal north-south movements of right whales, NMFS has divided the Southeast U.S. Restricted Area into two separate management areas (N and S) that are divided at 29° 00′ N. lat.

Comment 99: One commenter said that the restricted period in the Southeast should be changed from March 31 to March 25 or earlier south of the Cape Canaveral and north of Sebastian Inlet. The commenter also said that if whales are not present in the area, it should be opened.

Response: NMFS has considered this comment. However, sightings data from aerial surveys indicate that March 31 is an appropriate temporal boundary for this area.

Comment 100: One commenter believed that extending the current eastern boundary to the EEZ line for Florida fisheries should only occur if NMFS has precise data about whale migratory patterns and routes.

Response: This final rule implements a broad-based approach to the ALWTRP regulations, and focuses on the times and areas where large whales are likely to occur. NMFS believes that the boundaries of management areas, as presented in this final rule, appropriate for large whale protection. Surveys are continually conducted by the NMFS Southeast Fisheries Science Center and other NMFS partners. At this time, NMFS cannot conclude with certainty that large whales are not occurring in offshore waters out to the eastern edge of the EEZ; thus, NMFS deems it appropriate to extend the boundary.

Comment 101: Several commenters suggested that the original names for the Southeast management areas should be kept the same for clarity because the new names are confusing.

Response: Based on public comment, NMFS is not including the proposed name change in this final rule. However, based on the commenters' view that the proposed name changes are confusing, NMFS is implementing a modified name change more similar to the status quo. For regulated waters west of 80° 00′ W. long., NMFS is keeping the "Southeast U.S. Restricted Area" terminology and adding a "N" or "S" to denote North or South of 29° 00′ N. NMFS is changing "Southeast U.S. Observer Area" to "Southeast US Monitoring Area" due to the Vessel Monitoring System (VMS) being substituted for 100-percent observer coverage in the Southeastern U.S. Atlantic shark gillnet fishery.

1.1.8 Comments on SAM and DAM

Comment 102: Several commenters support the elimination of the SAM program stating

that the effectiveness and enforceability of SAM is controversial.

Response: NMFS disagrees with the commenters' statements that the SAM program is being eliminated because of controversiality regarding its effectiveness and enforceability. This final rule implements an expansion of the SAM program to bridge the gap between the publication of the final rule and the effectiveness of the floating groundline prohibition 12 months after publication of the final rule. NMFS has no evidence that the gear modifications required under the SAM program have resulted in an entanglement, serious injury, or mortality to large whales. NMFS believes that the entanglements that occurred since the 2002 implementation of the SAM and DAM programs are the result of gear interactions with large whales in areas outside of the SAM and DAM programs. In fact, this final rule will implement many of the SAM gear modifications on a year-round or seasonal basis throughout the Atlantic coast. The elimination of the SAM program 12 months after publication of this final rule is a result of the expansion of the final SAM gear requirements rather than an elimination of the SAM program because it is not effective or enforceable.

NMFS agrees that at-sea enforcement is important to the success of the ALWTRP and has conducted enforcement activities. NMFS also relies on its partnership with the U.S. Coast Guard (USCG) and state agencies to monitor compliance with the ALWTRP. NMFS has existing penalty schedules for violations of the MMPA and the ESA, and regulations pursuant to those statutes. In addition, NMFS has entered into agreements with many states to encourage and facilitate joint enforcement of regulations. In recent years, NMFS, in collaboration with the USCG and its state partners, has targeted small areas within SAM areas to check compliance with SAM gear modifications. Smaller inshore areas were chosen based on the volume of gear fished in the area and the proximity to right whales. NMFS will continue to work with its state partners and the USCG to enforce the requirements of the ALWTRP.

Comment 103: Many commenters support maintaining and/or expanding SAM. The commenters offered the following suggestions on SAM expansion: (1) Expanding SAM with respect to other fishery closures, review of recent large whale entanglements and other mortality and foraging data; (2) expanding SAM requirements year-round; (3) combining an expanded year-round SAM with Alternative 2 to provide the most conservation benefit to large whales; and (4) adjusting expanded SAM boundaries until the SAM program is eliminated and replaced with broad-based gear modifications.

Response: This final rule expands SAM East and SAM West zones by increasing the size of the SAM areas until 12 months after publication of the final rule when the groundline requirements are expanded to include all waters on a year-round or seasonal basis. Additionally, the boundaries for the southeast area of SAM East would be modified. The expanded SAM area would include the Great South Channel Critical Habitat area; therefore, trap/pot and gillnet gear would be subject to the SAM program inside critical habitat areas during time periods when the requirements for fishing inside these areas are no more conservative than the surrounding waters (i.e., when the protections of critical habitat areas disappear).

Extending SAM to the west and south will provide greater protection for endangered whales. Additional analyses of right whale sightings prompted the spatial adjustment of SAM

West to better reflect recent data on right whale seasonal distributions (Merrick, 2005). Additional broad-scale survey observations have also been evaluated by NMFS and support the decision to expand the SAM area. See Comment 116.

Comment 104: Some commenters stated that an expanded SAM program is inadequate. The commenters stated that it does nothing to protect large whales in areas outside of SAM areas and its geographic scale is smaller than that of whale movements. Furthermore, one commenter also stated that an expanded SAM still does nothing to protect whales going into Cape Cod Bay. The commenter mentioned it only takes effect for animals that are leaving Cape Cod Bay and the new SAM area will only include 2 out of the 17 DAM areas.

Response: Extending SAM to the west and south will provide greater protection for endangered whales. Additional analyses of right whale sightings prompted the spatial adjustment of SAM West to better reflect recent data on right whale seasonal distributions (Merrick, 2005). Additional broad-scale survey observations have also been evaluated by NMFS and support the decision to expand the SAM area. See Comment 116.

NMFS agrees that relying solely on the expansion of the SAM program, as proposed in Alternative 5, is inadequate to protect large whales for the same reason stated by the commenter. Except for the status quo Alternative 1, NMFS believes that Alternative 5 was the least conservative, risk-averse approach to the protection of large whales because it only required seasonal use of low-risk gear in the SAM area off the New England Coast. Although the SAM area was proposed to be expanded beyond what is currently required, the use of low-risk gear would only be required in a relatively small area along the entire Atlantic coast at a time when right whales are known to aggregate. NMFS believes that Alternative 5 does not consider seasonal migration patterns of large whales from Maine to Florida, resulting in lower risk reduction compared to both the time and area requirements provided in NMFS' approved alternative. Alternative 6 Final uses an expansion of the SAM program to serve as a bridge to allow fishermen until 12 months after publication of the final rule to convert their groundlines to sinking line. Once fully converted, the gear modifications provided under the revised SAM program will be expanded to include all New England waters on a year-round basis and seasonally for the remainder of the Atlantic coast.

Comment 105: One commenter disagrees with the 6-month delay in effective date for SAM. The commenter states that fishermen using this area should already have sinking groundline.

Response: NMFS disagrees with the commenter. This final rule will expand the current SAM area, which will affect fishermen who had not been required to comply with the SAM gear requirements in the past. The 6-month delay in the effective date for SAM gear requirements is to allow fishermen in the new expanded areas to convert their gear.

Comment 106: One commenter opposes regulations in the area surrounding Mount Desert Rock, which could be included in a future SAM plan.

Response: This final rule will expand the SAM area, which will require gear modifications during certain times of the year within these areas. The expanded SAM requirement will be in effect until 12 months after publication of the final rule. The SAM area will not affect the immediate Mount Desert Rock area. However, beginning 12 months after publication of the final rule, fishermen in the Mount Desert Island area may be affected by the groundline requirements, consistent with the SAM program, depending on whether the fishermen fish seaward of the Maine state exemption line.

Comment 107: One commenter believes that the success of the revised SAM program, exemption lines, or any other boundary-based management approach rests on the assumption that NMFS sets the boundaries in the most appropriate locations, considering the risks to whales and the compliance costs to fishermen. The commenter suggested that NMFS work with Maine DMR to periodically review and adjust the boundaries and gear requirements of SAM as necessary.

Response: NMFS agrees with the commenter. Regarding the SAM program, NMFS reviewed the NARW Sightings Database through early 2003, supplemented by additional data on humpback and fin whale sightings. In addition, NMFS used information, including that which was provided by the State of Maine, to modify the Maine state exemption line (see response to Comment 84). NMFS will continue to work with Maine, other state partners, and ALWTRT members to develop appropriate measures for the ALWTRP.

Comment 108: One commenter believes the boundaries for expanded SAM areas do not reduce risk, stating that the SAM West area does not protect late winter arrivals (December-February) and that the overlap is too small. The commenter states that the reduced eastern portion of SAM East combined with DAM elimination equals a net loss of right whale protection. The commenter stated that two analyses of data to determine boundaries for SAM were March to May and March to July, but that January and February were not considered in the analyses. The commenter stated that sightings data from 2004-2005 were ignored and NMFS should have used them (see http://whale.wheelock.edu/whalenet-stuff/reportsRW_NE).

Response: NMFS believes that the expanded SAM area implemented in this final rule provides increased protection for right whales, as well as other large whales, in the Gulf of Maine and currently does not have data to support changing its boundaries. NMFS delineated the expanded SAM area based upon the best data available at the time which included data from approximately 1960 through 2003 from the NARW database distributed in December 2004 (Merrick 2005). This dataset included sightings through fall 2003; the 2004 data had not been added and the 2005 data had not yet been collected. NMFS analyzed data from March through July only, and did not analyze data from January and February as there were very little winter sighting's data available at that time.

Comment 109: NMFS received numerous comments supporting the elimination of the DAM program.

Response: This final rule eliminates the DAM program six months after publication of this final rule.

Comment 110: Two commenters supported elimination of the DAM program but were concerned that it will reduce the incentive for fishermen to change over their gear. Another commenter stated that the unpredictability of the DAM program can lead to fishermen converting their gear.

Response: NMFS believes that eliminating the DAM program will not reduce the incentive for commercial fishermen to convert to the SAM or DAM gear modifications. When the initial SAM and DAM programs were implemented in 2002 and the DAM program was amended in 2003, NMFS acknowledged that one of the benefits of these programs was that they provided an incentive for commercial fishermen to convert their gear to the more restrictive gear requirements on a year-round basis. NMFS believes that many fishermen chose to convert on a year-round basis to avoid interruptions in their fishing seasons because of gear modifications imposed by the SAM and DAM programs. Furthermore, two gear buyback programs have been completed, and a third buyback program is currently underway. These buyback programs provide more incentive to fishermen to convert their gear because they are compensated for converting their gear prior to the implementation of the more restrictive gear requirements.

Comment 111: Many commenters believe that the DAM program should not be eliminated 6 months after publication of this rule and NMFS should keep the DAM program as part of the ALWTRP. The commenters believe that if NMFS eliminates DAM, there is no contingency measure for when whales are sighted in exempted areas. Specifically, some commenters said there will be no method to protect right whale aggregations in the Gulf of Maine (outside SAM) between now and 2008, especially during the fall and winter.

Response: The DAM program is not designed for exempted areas. This final rule expands the SAM area and allows the DAM program to be eliminated six months after publication of this rule. NMFS conducted two different analyses to examine whether and where SAM would provide additional protection to right whales. The results of these analyses indicated that the area to be incorporated into the expanded SAM would encompass many of the areas that previously have been designated as DAM areas. Thus, NMFS believes that replacement of the DAM program with an expanded SAM program will increase the protection afforded to whales. In addition, NMFS believes that expanding the SAM area will provide greater protection to right whales in the Northeast during times of predictable spring aggregations. In particular, the new overlap of SAM East and SAM West will provide a direct benefit to right whales in this area during April, when the number of right whales in the vicinity is expected to be high. In addition, six months after publication of this final rule, additional gear modifications will take effect in the areas outside of the expanded SAM area.

Comment 112: Some commenters supported eliminating the DAM program as soon as sinking/neutrally buoyant groundline requirements take effect (e.g, 2009 in some areas and 2010 in others). Several commenters favored elimination of the DAM program, but support its

continuation until 2008 or 2009 with the implementation of gear modifications (e.g., low profile groundline). Other commenters believed the DAM program should be eliminated as soon as possible with the SAM expansion.

Response: See response to Comment 111. As described in the DEIS, NMFS considered but rejected the low profile groundline concept (see also Response to Comment 158).

Comment 113: Two commenters encouraged NMFS to retain and expand the DAM program into the Mid-Atlantic area even though they believe it takes NMFS too long to implement; the commenters suggested speeding up the process of filing the DAM rules in the *Federal Register*. Another commenter said that DAMs should be implemented and rescinded more quickly.

Response: NMFS explored options to expedite the implementation of DAM areas. Once a DAM area is identified, NMFS must determine the appropriate action by considering a variety of factors, including but not limited to: 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. Despite NMFS best efforts to expedite the analysis of these factors, it still takes some time to complete and review the analysis prior to approval and implementation. Given the decision factors for implementing restrictions within a DAM area and the time needed to complete and review the analysis, NMFS could not find any ways to expedite the process. NMFS believes that replacing the DAM program with broad-based gear modifications designed to reduce entanglements and serious injury should an entanglement occur will increase the protection of right whales.

Comment 114: One commenter recommended expanding closed areas to buffer DAM zones and to allow for unpredictable movements of individual whales.

Response: The ALWTRP regulations favor broad-based gear modifications over area closures. Movement and location of whales is often difficult to predict with certainty, making gear modifications more protective than closures of limited areas. Furthermore, closures may produce undesirable consequences such as concentrations of gear just outside of closed areas, which could increase entanglement risks to large whales.

Comment 115: Several commenters encouraged NMFS to increase enforcement of DAMs and one commenter supported removing all gear from DAM zones to ease enforcement. If this does not occur, the commenter encouraged NMFS to develop a more effective enforcement strategy.

Response: The decision to eliminate the DAM program is not based on enforcement issues. NMFS has developed and implements a successful enforcement strategy for the DAM program through its agreements with its state partners and the vessel and aerial support provided by the USCG.

Comment 116: Some commenters suggested the agency should include all previous DAM zones into an expanded SAM, up to and including trigger areas defined by NMFS in 2005. Further, these commenters presume that NMFS believes expanded SAM would cover high use areas most likely to pose risk outside of critical habitat areas, such as Jeffreys Ledge, Stellwagen Bank, and the waters east of Chatham, MA. One commenter requested that NMFS revisit the expanded SAM analysis for Alternative 2, given that several DAM zones occurred outside the expanded SAM area from 2003-2005.

Response: NMFS considered many DAM areas when expanding SAM boundaries for this final rule. If whales were observed in the same area during the same season in three or more years, then this area was considered to have predictable concentrations of whales, and was incorporated into the final SAM area. However, many DAMs only occurred once in an area and were thus considered too unpredictable to be considered as Seasonal Management zones (Merrick 2005). Beginning 12 months after publication of this final rule, the expanded SAM zones will be eliminated as the final gear modifications required in the SAM zones will be expanded to include all areas, both spatially and temporarily, throughout the range of right whales and other large whale species.

1.1.9 Comments on Effective Date

Comment 117: Many commenters urged NMFS to implement gear modifications sooner than 2008. The commenters believed NMFS should implement ALWTRP modifications sooner because: (1) The proposed effective date does not comply with the MMPA; (2) the proposed effective date does not comply with the intent of ESA; and (3) PBR is being exceeded. Several commenters believed the gear modifications should occur sooner than 2008 in certain large whale habitats, such as Great South Channel, Stellwagen Bank, and Jeffreys Ledge, especially in light of the Massachusetts buyback program that assisted fishermen in converting to sinking and/or neutrally buoyant groundline.

Response: The ESA requires agency actions to avoid jeopardy, and NMFS believes the effective dates for this action are sufficient to avoid jeopardy. The action and effective dates are also in compliance with the goals of the MMPA, including reducing serious injury and mortality of large whales to below PBR.

In 2004, the International Fund for Animal Welfare, Massachusetts Division of Marine Fisheries (MADMF), and the Massachusetts Lobstermen's Association partnered to implement a lobster gear buyback program. More than $650,000 was disbursed to Massachusetts lobster fishermen who turned in floating groundline; these fishermen replaced the floating line with non-buoyant line consistent with the measures contained in this final rule. Therefore, NMFS believes a portion of the industry is voluntarily implementing the measures in this final rule before they are required to do so through the ALWTRP. In addition, NMFS, in collaboration with National Fish and Wildlife Foundation (NFWF), administered a similar buyback program in the Mid-Atlantic; see response to Comment 110. Finally, The Gulf of Maine Lobster Foundation received a grant from NMFS for the development and implementation of a floating groundline buyback and recycling program, in which floating groundline is exchanged for sinking or

neutrally buoyant groundline. The first phase of this program took place in May 2007 in southern Maine and participants included Maine state lobster fishermen in Zone G as well as federal lobster permit holders in Maine.

Comment 118: Many commenters stated that the time period for implementing the final rule is too short. The commenters believe NMFS should extend the time to implement the ALWTRP because: (1) There is a limited availability of line; (2) price gouging may occur; (3) gear manufacturers are hesitant to produce line based on their awareness of current line testing; (4) there is a lack of awareness of the actual [line] breaking strength and schedule of degradation; (5) there is no immediate process for changing line; (6) two line testing experiments are currently underway to determine the usable life of sinking groundline and the practical commercial application of new materials; (7) it will give offshore lobstermen more time and allow NMFS to consider the possibility of low profile groundline; (8) it will allow for more research and financial planning by industry; (9) as is, it would cause a large capital expenditure over a 2-year period; (10) it will give the Federal Government and environmental groups more time needed to secure funding to minimize the financial burden; and (11) it will cost approximately $100,000 for an offshore lobsterman to switch over his gear. Many commenters suggested an implementation time of 4 years from the publication date of the final rule.

Response: Typically, NMFS provides 30 or 60 days for fishermen to comply with gear modifications such as mesh size restrictions and other requirements. However, as evident by overwhelming public comment, given the magnitude of the time and resources needed by fishermen to change their gear to sinking and/or neutrally buoyant groundline, NMFS believes giving fishermen 12 months from the publication of the final rule to comply is warranted. See the "Comments on Low Profile" portion of the this section with respect to low profile issues. The costs and impacts analyzed in Chapters 6 and 7 of the EIS explicitly consider the incremental effects of groundline replacement beyond routine levels.

The cost analysis presented in the EIS is based on prevailing market prices for all factor inputs, including neutrally buoyant and/or sinking groundline. One commenter points out that groundline suppliers may take advantage of a mandate to use neutrally buoyant and/or sinking groundline by resorting to price gouging, i.e., charging artificially high prices in order to realize large profits. The government is aware of the potential for such behavior and, if it occurs, may take action to stop it. NMFS also believes, however, that the schedule for implementing the modifications in the final rule will reduce the potential for price gouging. The requirement to use neutrally buoyant and/or sinking groundline does not take effect until 12 months after publication of the final rule. NMFS believes spreading initial demand for neutrally buoyant and/or sinking line over this period of time will likely relieve market pressures that might otherwise lead to price gouging. NMFS further believes the 12 month phase-in period would give suppliers of neutrally buoyant and/or sinking line the opportunity to increase production to meet the increased demand; this increase in production would likely mitigate against price gouging. Thus, NMFS believes rope will continue to be available for fishermen to comply with the effective date for the ALWTRP sinking and/or neutrally buoyant groundline requirements.

Although the model vessels analyzed in Chapter 6 of the EIS are generalized and may not reflect costs for all individual vessels, NMFS does not believe incremental costs (i.e., costs

beyond routine gear replacement costs) will typically be as high as $100,000. The analysis suggests that initial investment costs are more on the order of $39,000 for large offshore vessels. Furthermore, while costs may be high for some large offshore lobster vessels, the compliance costs are generally commensurate with revenues for these large operations, i.e., costs as a percent of revenue are not prohibitive. Chapter 7 of the EIS identifies vessel segments that may be heavily impacted by the requirements and suggests that under Alternative 6 Final (Preferred), a limited number of small vessels are most at risk. Although costs are high for some vessels, NMFS made modifications to the final rule, based on public comment, to decrease costs where possible while still meeting its goals under the MMPA and ESA (see Changes from the Proposed Rule section of the preamble). While these vessels may still realize high costs relative to revenues, fishermen have some options to try to mitigate the costs. For example, the impacts of converting to sinking and/or neutrally buoyant groundline may be defrayed, in part, by current and future groundline buyback programs operated by NMFS and other partners. In addition, although the requirements under Alternative 6 Final (Preferred) may impose significant costs within the first year after publication of the final rule (to convert all groundline to sinking and/or neutrally buoyant groundline), fishermen may be able to distribute the cost of the new gear over its useful life by seeking a loan. After the first year, ongoing costs would be significantly lower as fishermen would only need to replace worn-out and lost gear.

Comment 119: One commenter suggested NMFS require switching to sinking/neutrally buoyant groundline for trap/pot gear in 2009.

Response: The sinking and/or neutrally buoyant groundline requirement will be effective in expanded SAM areas six months after publication of this final rule, and in all other areas effective 12 months after publication.

Comment 120: Some commenters stated that complying with the proposed weak link regulations by 2008 would be problematic. One commenter stated that splicing weak links into existing gear will be time-consuming, costly, change how gillnets work and lower the catch. The commenters suggested requiring weak links by 2009 or 2010, as this would help reduce compliance costs and allow more time for gear modification.

Response: NMFS agrees that meeting the increase in the number of weak links per net panel from one to five or more, depending on the length of the net panel, will take time for fishermen. However, based on public comments received, this final rule gives gillnet fishermen 2 options to install the additional net panel weak links. These two net panel weak link options will be effective six months after publication of the final rule. However, thirty days after publication of the final rule these net panel weak link options will be allowed in current SAM areas and implemented DAM zones when a gear modification option is selected.

Comment 121: One commenter states that NMFS seems to be balancing interests of different groups that advocate for accelerated phase-in of gear modifications with those that favor a longer phase-in period. The commenter stated that NMFS sees species survival equal to the interests of the fishing industry, and that this approach directly counters NMFS' obligation to

protect whales and take measures to recover species under the MMPA and ESA.

Response: NMFS disagrees and believes it is implementing the appropriate measures to reduce risk associated with groundlines, amongst other risk reduction measures, as quickly as is feasible and consistent with the requirements of the MMPA and ESA.

1.1.10 Comments on Groundline

Comment 122: One commenter questioned whether there is overwhelming evidence that groundline has caused entanglements.

Response: There is evidence that groundline has been involved in whale entanglements. Both buoy lines and groundlines have been identified as sources of entanglements.

Comment 123: Many commenters supported the use of sinking groundline. One commenter stated that it will substantially reduce entanglement risks because it will reduce the amount of line in the water column. One commenter stated there are few areas in Massachusetts where large whales have not been sighted, and also stated that sinking groundline may cause fewer gear conflicts. However, another commenter supported the use of sinking groundline only if it would help the whales, and is not in favor of it in areas where there are going to be gear losses and it would not save any whales.

Response: NMFS appreciates the support with respect to sinking and/or neutrally buoyant groundline and agrees that the end result is less line in the water column, and therefore a reduced risk of entanglement. NMFS agrees that fewer gear conflicts may be a byproduct of sinking and/or neutrally buoyant groundline. As discussed in the FEIS, NMFS believes the use of sinking groundline will reduce the risk of entanglement and recognizes it may increase gear losses.

Comment 124: One commenter cautions that juvenile humpback whales and right whales have emerged with mud on their heads, which indicates feeding on the bottom. Therefore, risks to these whales may be increased when using sinking groundline. The commenter states that it will be critical to monitor gear modifications, specifically regarding how and when effectiveness will be measured.

Response: Although there are anecdotal reports of whales going to the bottom or having scratches on their snouts and stomachs, presumably from traveling to the bottom, there is little published data that supports these reports; whale behavior (i.e., foraging) at various depths and bottom types is also largely unknown at this time. NMFS recognizes that whales may spend time at or near the bottom in some habitats, as described by the commenter. The sinking groundline concept is a measure to remove the maximum amount of line from the water column in an effort to reduce the overall risk of entanglement. See also Comment 267.

Comment 125: Many commenters believed that rocky ledges are unlikely habitat for

large whales and questioned whether NMFS knew if large whales are bottom feeders around rocky bottoms. These commenters also believed low profile line should not be prohibited in such areas (i.e., inshore rocky habitat).

Response: Currently, available data and scientific literature do not suggest that whales treat rocky bottom areas any differently than locations with other bottom types (e.g., mud). NMFS data show whales aggregate over the northern edges of George's Bank, which is dominated by rocky ledges. NMFS acknowledges that a better understanding is needed on prey distribution, and how whales utilize the water column, including the foraging and diving behavior of whales.

Comment 126: One commenter does not believe that sinking/neutrally buoyant groundline would pose a risk to bottom-feeding whales.

Response: NMFS recognizes that any line in the ocean poses some risk of entanglement and believes that sinking and/or neutrally buoyant line reduces that risk substantially.

Comment 127: One commenter supports sinking groundline for gillnet gear.

Response: NMFS appreciates the support for sinking groundline in gillnet gear.

Comment 128: Many commenters opposed sinking/neutrally buoyant groundline. The commenters objected to this requirement because they believed the use of sinking/neutrally buoyant groundline would cause the following: (1) The potential for an increase in hangdowns, chafe, snag and/or burring that would then increase gear loss/ghost gear; (2) safety issues and potential injury to fishermen; (3) a significant increase of vertical lines in the water as fishermen who normally fish pairs, triples, or trawls would probably move to fishing singles (i.e., if they had to use sinking and/or neutrally buoyant line); (4) the line to twist around the traps; and (5) the line to sand up during storms and making it hard to grapple to get it back. Furthermore, commenters cited other reasoning for not using sinking/neutrally buoyant groundline, including: (1) The threat to large whales is not reduced by changing line type (Johnson et al., 2005); (2) replacement costs for traps (traps cost $55 to $70) and line would be expensive; (3) the rope manufacturers could not produce enough line to outfit the offshore fleet by 2008; and (4) switching away from floating line will force everyone to fish in the gravel and mud gullies, instead of the hard bottom, and will increase congestion.

Response: The fishing industry from Maine to Florida utilized sinking line successfully in a variety of applications prior to the advent of floating line, and some percentage of fishermen today do not use floating groundline for a variety of reasons. In implementing a prohibition on floating groundline, NMFS acknowledges fishermen may experience operational difficulties in adjusting to sinking and/or neutrally buoyant groundline in different habitats. However, NMFS believes that industry can develop fishing practices to address any difficulties in transitioning from floating groundline to sinking and/or neutrally buoyant groundline, as evident at the 2005 NMFS Low Profile Groundline Workshops by one fishermen transitioning in rocky habitat areas.

NMFS further acknowledges that the potential for hangdowns and gear loss/ghost gear may increase. The economic cost analysis in the FEIS explicitly takes into account potential changes in gear loss rates under the various regulatory alternatives. The economic analysis also explicitly takes into account the need to replace sinking and/or neutrally buoyant line more frequently than floating line.

NMFS believes that the gear modifications required under the ALWTRP do not present any significant increased dangers above those of normal fishing practices. However, NMFS will continue to monitor this situation through discussions with industry and the ALWTRT.

NMFS recognizes there may be an increase of vertical lines due to the number of traps per trawl being reduced; however, the total amount of line in the water column will be reduced as a result of the neutrally buoyant line measures. There are currently provisions in the regulations that prohibit single traps in certain times and areas to reduce the overall number of vertical lines. NMFS believes the reduction of line in the water column based on the use of sinking and/or neutrally buoyant groundline will provide a substantial reduction in entanglement risk. NMFS also recognizes the issue of vertical lines as an entanglement risk and will be addressing that subject with the ALWTRT. NMFS recognizes the potential for groundline to twist around traps and that this may contribute to hangdowns; however, the risk reduction associated with the use of sinking and/or neutrally buoyant groundline warrants this gear configuration.

NMFS recognizes that the longevity of sinking and/or neutrally buoyant groundline has the potential for being less than floating groundline. NMFS believes that the rope manufacturing industry is aware of the issue and will continue to work on enhanced lines that address this concern.

NMFS believes that using sinking and/or neutrally buoyant groundline, as opposed to floating groundline, will reduce risk of entanglement. The is also supported by a study by Johnson *et al.* (2005).

NMFS recognizes there are costs to the fishing industry to comply with these gear provisions. Groundline replacement costs represent a large share of the overall compliance costs for most affected vessels. The social impact analysis included in the FEIS examines the economic burden posed by the alternatives and the likely effect on the economic viability of fishing operations. The analysis identifies vessel segments that may be heavily impacted by the requirements and suggests that under Alternative 6 Final (Preferred) a limited number of small vessels are most at risk when comparing annual compliance costs to average per-vessel revenues. While some of these small vessels face costs that could potentially drive them out of business, current and future groundline buyback programs may help defray the compliance costs for many vessels. See response to Comment 57 for additional information related to defraying costs.

NMFS and its state partners have worked with rope manufacturers to keep that industry informed of the potential for a large increase in demand for sinking and/or neutrally buoyant line. In addition, the requirements are spread over a one year period.

NMFS recognizes that the change from floating groundline to sinking or neutrally buoyant groundline may result in changes in fishing practices and areas. The risk reduction warrants these changes in fishing practices and gear configuration.

Comment 129: One commenter stated that the $120,000 cost that fishermen are expecting/predicting does not take into account petroleum, the rising cost of everything, or the fact that sinking rope is heavier than the floating rope that is being used. The Commenter states that fishermen will have to replace their rope more and more, which is double or triple the cost of what they are currently spending. This will result in price gouging.

Response: While the model vessels employed in the economic impact analysis presented in the EIS are generalized and may not reflect costs for all individual vessels, NMFS does not believe incremental costs (i.e., costs beyond routine gear replacement costs) will typically be as high as $120,000. The analysis suggests that initial investment costs are likely to be more on the order of $39,000 for large offshore vessels. While it is true that input costs – particularly fuel costs – are rising, the cost analysis presented in the FEIS has been updated to reflect recent changes in costs. The price of sinking and/or neutrally buoyant line employed in the analysis is greater than the price it specifies for floating line, but the difference is less than a factor of two (not the two to three factor noted by the commenter). In addition, the cost analysis incorporates assumptions that recognize the shorter useful life of sinking and/or neutrally buoyant groundline. Regarding price gouging, the government is aware of the potential for such behavior and, if it occurs, may take action to stop it. NMFS also believes that the schedule for implementing the modifications in this final rule will reduce the potential for price gouging. The requirement to use sinking and/or neutrally buoyant groundline does not take effect until 12 months after publication of the final rule. NMFS believes spreading initial demand for sinking and/or neutrally buoyant groundline over this period of time will likely relieve market pressures that might otherwise lead to price gouging. NMFS further believes the 12 month phase-in period would give suppliers of sinking and/or neutrally buoyant groundline time to increase production to meet the increase in demand; this increase in production would likely mitigate against price gouging. See also Comment 118.

Comment 130: Several commenters questioned the quality and durability of sinking groundline, stating that fishermen cannot find anything that lasts more than 2 years, whereas 15-year old float rope is as good as new. Other commenters believed that more research should be conducted to make sinking rope more durable before any regulations require the use of sinking line. They stated that sinking line frays more easily in the normal course of fishing and consequently wears out faster than polyester and polyurethane floating rope and it is more expensive.

Response: Sinking groundline has been utilized in the fishing industry for many years and new line blends have been and continue to be developed to address the issues raised in this comment. NMFS has funded research with the states, manufacturers, and industry to address this issue. Based on public comment received, industry and state fishery management representatives noted that in some unique areas, particularly off the coast of Maine, there may be a need to allow groundline the ability to float over rocky bottom types. See response to Comment 158 on issues related to “low profile” groundline.

Comment 131: Commenters stated that, in New Jersey, groundlines are usually full of

recreational fishing hooks. The commenters believe sinking rope is not durable enough to handle pulling hooks out often, so they will have to replace sinking groundline more often than floating groundline.

Response: This issue appears to be unique to New Jersey and may require that the affected fisherman work with line manufacturers to develop an enhanced sinking groundline to address this issue. NMFS believes that sinking and/or neutrally buoyant groundline may actually reduce the incidence of recreational hook entanglement in groundlines as the groundline will be out of the water column, therefore less likely to encounter the recreational gear, as recreational hooks travel up and down through the water column.

Comment 132: Several commenters believe that fishing with sinking and/or neutrally buoyant line will cause "hangdowns" to occur every few minutes, which will increase abrasion and cause the line to fill with sand. Furthermore, hangdowns are considered a safety hazard. For example, a USCG Safety Alert issued on May 28, 1998, for small vessel stability warned that "gear hung down on the seabed" is a dangerous condition to fishermen; even larger vessels up to 50 ft (15.2 m) will be at severe safety risk due to rope getting stuck under rocks/ledges.

Response: See Response to Comment 128.

Comment 133: Several commenters stated that there are many areas where sinking and/or neutrally buoyant groundline cannot be usedinstead they should be allowed to use float rope in those area. Many commenters referred to hard/rocky/tidal/ragged bottoms and/or habitats. Commenters suggested that sinking and or neutrally buoyant line is not feasible in these areas because: (1) There would be a large amount of gear loss if required to use sinking line; (2) there would be chafing; (3) there would be an increase in hangdowns; and (4) it is impossible to fish the hard bottom in Maine using pairs, triples, or trawls without the use of floating groundline. Other areas where commenters stated sinking and/or neutrally buoyant line could not be used included: (1) Downeast Maine (one commenter made a specific reference to bottom topography changes east of Casco Bay); (2) the North Carolina black sea bass fishery; (3) live rock or coral areas; (4) wrecks; (5) reefs; and (6) bottoms that include sand and shell (clam and oyster), as it would could cause chafing.

Response: See Response to Comment 128 regarding hangdowns, chafing, unique bottom types and bottom compositions. See below for habitat and coral area discussion.

NMFS acknowledges there are unique issues related to habitat impacts, live rock and coral areas and, although sinking and/or neutrally buoyant groundlines could interact with the seafloor and adversely impact benthic marine habitats, these impacts are not expected to be more than minimal when compared to the use of floating groundline. The FEIS provides a description of the affected environment, including the identification of areas designated as Essential Fish Habitat (EFH) and Habitat Areas of Particular Concern (HAPCs) as well as an analysis of the impacts of fishing gear on this environment. Bottom-tending static gear (e.g., traps/pots) has been found to have low to moderate effects on benthic habitats when compared to the more severe physical and biological impacts caused by bottom-tending mobile gear (e.g., bottom

trawls and dredges). Furthermore, the amount of bottom area that would be disturbed by sinking and/or neutrally buoyant groundline, and the frequency of disturbance in the exact same area that would result from repeated contact with sinking and/or neutrally buoyant groundline, would be very small, allowing enough time for recovery of benthic communities that would potentially be affected. Thus, NMFS has concluded that the final preferred alternative is not expected to have more than a minimal and temporary adverse impact on benthic EFH.

NMFS evaluates and regulates the adverse impacts of fishing on bottom habitats in other management actions. Currently, several areas in the Northeast (e.g., on Georges Bank, in southern New England, and in the Gulf of Maine) are closed to the use of mobile, bottom-tending fishing gear, such as bottom trawls and dredges, and two offshore canyons (e.g., Lydonia and Oceanographer) are closed to the use of bottom trawls and gillnets by vessels using monkfish days-at-sea permits. The monkfish closures have the added benefit of protecting deep-water corals and other structure-forming organisms in these two canyons. The New England Fishery Management Council (NEFMC) published a Notice of Intent on February 24, 2004 (69 FR 8367), to prepare a programmatic EIS and Omnibus EFH Amendment that will apply to all Council-managed FMPs. This amendment has been divided into two phases (70 FR 53636, September 9, 2005). In phase 1, the amendment will revise the existing EFH and HAPC designations for all 27 Council-managed species. In phase 2, the NEFMC is expected to identify and implement new measures to minimize the adverse impacts of fishing on EFH, which would replace or supplement the existing regulations. Final action on the Omnibus Amendment is not expected until late 2008 or early 2009. EFH protection measures are also being considered by the Mid-Atlantic Fishery Management Council in individual FMPs that will be promulgated during the next several years. The Atlantic States Marine Fisheries Commission (ASFMC), composed of representatives from the Atlantic coastal states and the Federal Government, develops fishery conservation and management strategies for certain coastal species, including American lobster, and coordinates the efforts of the states and the Federal Government toward concerted sustainable ends. NMFS is working cooperatively with the ASFMC to evaluate the EFH impacts of the lobster trap fishery. In the Southeast, with regard to preventing, mitigating, and minimizing the adverse effects of fishing on EFH, the Gulf of Mexico and Caribbean Fishery Management Councils (FMC) in 2004 considered prohibiting sinking groundlines between traps/pots traps to prevent sweeping of the bottom during trap/pot retrieval and recognized the effect of probable increased interactions of buoy gear with marine mammals by requiring individually buoyed traps/pots. In 1991, the South Atlantic FMC prohibited fish traps throughout its jurisdiction with the exception of black sea bass pots north of Cape Canaveral, Florida, because sea bass pots are small, fished primarily in shallow waters less than 20 fathoms (36.9 m or 120 ft), and there was a lack of evidence of environmental harm. This Council is currently conducting a review of its EFH designations and provisions to protect EFH. Each of the southeast Councils identified practicable measures to minimize adverse affects of fishing by using a variety of factors when evaluating the impacts of fishing gears. These included the duration and frequency of the impact, the intensity and spatial extent of the impact, and the sensitivity of the habitat and habitat functions. When considering these factors and that the proposed action will not change fishing practices, NMFS believes that sinking and/or neutrally buoyant groundlines would result in impacts on EFH that would be no more than minimal and temporary in nature.

Additionally, in response to a petition by Oceana to immediately promulgate a rule to protect deep-sea coral and sponge (DSCS) habitat from the impacts of mobile bottom-tending fishing gear, NMFS outlined an approach to address these issues (70 FR 39700, July 11, 2005). Specifically, NMFS adopted an approach to address DSCS issues that will be formalized in a National DSCS Conservation and Management Strategy. NMFS will work actively with each Regional FMC and the ASMFC to evaluate the issue, and take action where appropriate, to protect DSCS, which may include future rulemaking to protect DSCS in specific locations based on analyses for specific fisheries. Additionally, NMFS plans to develop a strategy to address research, conservation, and management issues regarding DSCS habitat, which eventually may result in rulemaking for some fisheries.

Comment 134: Many commenters believe that sinking line should not be required more than 100 miles (185.2 km) offshore or in deep canyons. Reasons include hangdowns and rope getting caught on rocky areas which produce major safety issues.

Response: See response to Comment 128 regarding hangdowns and safety concerns. Current sightings data shows whales occurring in waters greater than 100 miles (185.2 km) offshore. Data also suggest that right whales, humpback whales, and fin whales all occur at the edge of canyons. For example, northeast sightings data places large whales at the edge of the seafloor drop-off for George's Bank in the Gulf of Maine. See also Comment 125. To ensure adequate protection for large whales in these areas, NMFS believes groundline regulations put forth in this final rule are appropriate.

Comment 135: Several commenters emphasized their belief that low-cost alternatives to sinking line were needed before there are any requirements for groundlines to be composed exclusively of sinking line. They urged NMFS to conduct more research on low-cost alternatives. Several commenters requested that NMFS include a low cost alternative in the FEIS based on research by the NMFS Gear Team. The commenters stated that, if this is not included, NMFS should indicate in the FEIS the agency's commitment to developing a low-cost alternative prior to phasing in gear modifications. The commenters cited page 3-41 of the DEIS, Alternatives Considered but Rejected, and stressed the importance of a low-cost alternative to reducing groundline profile for New Jersey fishermen; commenters believe the data are already available to support/implement low profile line.

Response: NMFS has sought comments and considered many proposals from the ALWTRT and public, and no suitable, low cost alternative to sinking and/or neutrally buoyant line has been identified. In the absence of an alternative to sinking and/or neutrally buoyant groundline that, amongst other factors, is low cost to industry, enforceable and also reduces serious injury and mortality to large whales, NMFS is implementing a sinking and/or neutrally buoyant groundline requirement in this final rule. Research continues on alternative approaches to those contained in this final rule. NMFS plans on further discussing the concept of low profile line with the ALWTRT at the next meeting.

Comment 136: Several commenters requested that, if a sinking/neutrally buoyant

groundline is implemented, NMFS should: (1) Allow 2,000-lb (907.2-kg) weak links in offshore areas; (2) exempt the top line of gillnets; (3) exempt the bottom third of up and down lines; (4) establish a 1.03 specific gravity standard; (5) extend the phase-in period so fishermen can amortize rope replacement costs; (6) conduct research to improve sinking line durability; (7) explore whether rope manufacturers can produce sinking line that meets federal requirements; and (8) consider the safety issues of working with sinking line.

Response: NMFS does not recognize a link between weak link breaking strength and sinking or neutrally buoyant groundline. Top lines of gillnets are not required to be composed of sinking or neutrally buoyant line. Composition of up and down line or buoy lines are currently regulated in 3 areas, Cape Cod Bay, SAM West, and SAM East, during seasonal periods. During these seasonal periods buoy line composition does allow the bottom third to be composed of floating line. Buoy line composition, floating versus sinking or neutrally buoyant, is not regulated in all other ALWTRP areas. NMFS has included a definition of neutrally buoyant or sinking line specifying a specific gravity in this final rule. The final rule does require sinking and/or neutrally buoyant groundline 12 months after publication of the final rule. NMFS, rope manufacturers, and the fishing industry continue to work on the durability issue. However, NMFS believes the phase-in period implemented in this final rule is still warranted to reduce the serious injury and mortality of large whales due to entanglement in commercial fisheries in order to meet NMFS' mandates under the MMPA and ESA. NMFS has determined that manufacturers have produced line that meets the standard required by this final rule. Additionally, NMFS has considered safety issues of working with sinking line and will continue to consider safety with the ALWTRT.

Comment 137: Many commenters requested that NMFS develop a rope buy-back program. The commenters support the program for the following reasons: (1) It would ease the burden of switching to sinking groundline (e.g., help absorb financial burdens and defray the higher cost of sinking rope);(2) it would encourage fishermen to change over to sinking/neutrally buoyant groundline earlier than the proposed implementation date; and (3) a line recycling/buyback program is the only acceptable solution for taking care of miles of useless poly line.

Response: NMFS agrees that buyback programs are a viable option for the reasons stated and several programs have been executed in states along the eastern seaboard. See responses to Comments 117, 138, 139, and 140 regarding Massachusetts, Mid-Atlantic, and Maine gear buyback program activities.

Comment 138: One commenter mentioned the gear buyback pilot program, in which 300 Massachusetts inshore lobster fishermen participated and 300,000 lbs (136,078 kg) of floating groundline were collected. The commenter hopes this pilot program will serve as a model for other states as gear modification requirements take effect.

Response: NMFS agrees and, in collaboration with NFWF, administered a similar buyback program in the Mid-Atlantic during January 2006. This exchange program is also an

effort to remove floating groundlines between traps/pots. State and/or federally licensed/permitted commercial trap/pot fishermen in New Jersey, Maryland, Delaware, Virginia, and North Carolina were eligible to participate. In addition, the State of Maine is initiating a buyback program in 2007 (see responses to Comments 117, 137, 139, and 140).

Comment 139: One commenter believes that fishermen will not be able to bear the full economic burden of the proposed regulations. One commenter states that a Congressional budget earmark for multi-year poly buyback and rope exchange was requested for Maine to coincide with proposed low profile implementation dates (2007-2009).

Response: The social impact analysis included in the FEIS examines the economic burden posed by the alternatives and the likely effect on the economic viability of fishing operations. The analysis identifies vessel segments that may be heavily impacted by the requirements and suggests that under Alternative 6 Final (Preferred), a limited number of small vessels are most at risk when comparing annual compliance costs to average per-vessel revenues. Current and future groundline buyback programs may help defray the compliance costs for many vessels.

Comment 140: One commenter stated that The Ocean Conservancy is working closely with the State of Maine, Maine Lobstermen's Association (MLA), and Southern Maine Lobstermen's Association to secure funding to assist fishermen with line replacement.

Response: NMFS confirms that several entities in Maine have been working to establish a line replacement program. The Gulf of Maine Lobster Foundation has been identified to develop and conduct a line replacement program in 2006 and 2007. The Gulf of Maine Lobster Foundation is currently administering the program with 1.9 million dollars they received via a Federal grant.

Comment 141: Many commenters asked NMFS to consider other regulations such as what the NEFMC is considering for protecting deep sea coral in canyons. One commenter stated that sinking groundline will get caught on deep sea coral and suggested that fishers are asked to use floating groundline only in canyons. Others commenters stated that chafing of rope would cause gear loss and the bottom would get torn up by the rope.

Response: NMFS acknowledges the impacts of sinking groundline, but NMFS believes that in many areas the industry can develop fishing practices to address any difficulties in transitioning from floating to sinking and/or neutrally buoyant groundline. NMFS will further discuss low-profile groundline for other areas at the next ALWTRT meeting. Also, see response to Comment 128.

Comment 142: One commenter would like to see a clause that, for pots less than 15 or 20 feet (4.6 or 6.1 m) apart, that sinking line is not required.

Response: NMFS recognizes that this configuration, 15-20 feet (4.6-6.1 m) groundline,

seeks to minimize the amount of groundline, which is a positive step toward the overall reduction of line in the water. However, NMFS is not able to exempt this configuration. NMFS will be discussing the concept of low profile groundline further with the ALWTRT at the next meeting, and will be providing the ALWTRT with comments such as this to consider.

Comment 143: One commenter stated that, in the waters where he fishes, one must use float rope because, while setting the gear in 50 fathoms (91.4 m or 300 ft), by the time it hits bottom, it is at 70 or 80 fathoms (128.0 m or 420 ft to 146.3 m or 480 ft) because it will be carried by the currents a half or 3/4 of a mile (0.8 or 1.2 km) before it hits bottom.

Response: NMFS recognizes there are many unique physical environments that fishermen contend with while fishing. The issue in this case appears to be the delay in time from the last trap being deployed from the vessel, the trawl hitting bottom and the drift of the trawl during that time. Sinking and/or neutrally buoyant groundline may actually be an asset in this unique case as the nature of this type of line (i.e., higher specific gravity compared to floating line) may reduce the time from the deployment of the last trap from the vessel until the trawl hits the ocean bottom.

Comment 144: One commenter believes that in Grand Manan Channel, where he fishes, it is impossible to continue business using sinking rope. His reasons for this include the rocky habitat and the tide in the area.

Response: NMFS has worked with industry in the Grand Manan Channel in the process of developing sinking and/or neutrally buoyant groundlines. NMFS has had discussions with some fishermen regarding the successful use of sinking and/or neutrally buoyant groundline in this area.

Comment 145: Two commenters requested an exemption from sinking groundline requirements in waters deeper than 100 fathoms (182.9m or 600 ft) along/in rocky canyons due to their jagged topography. Use of sinking groundline in these areas would cause hangdowns and rope getting caught, which is a big safety issue.

Response: NMFS is not able to exempt these areas at this time. See response to Comment 125 in reference to whale habitat and rocky bottoms. See response to Comment 128 in reference to hangdowns and safety issues.

Comment 146: One commenter supports the 280-fathom (512.1-m or 1,680-ft) groundline exemption as long as gear is marked and NMFS has a formal mechanism to reconsider this exemption if data show whales feeding at these depths or become entangled in gear fished at these depths.

Response: NMFS appreciates the support of the 280-fathom (512.1-m or 1,680-ft) groundline exemption. There is no provision for groundline marking in the ALWTRP, including in waters in excess of 280 fathoms (512.1 m or 1,680 ft). NMFS will continue to discuss gear

marking to monitor strategies with the ALWTRT to see whether additional gear marking strategies are needed and should be implemented in the future.

Comment 147: One commenter would like to see use of sinking line separated by lobster management areas. The commenter said that in LMA 2, 90-percent of fishermen fish on rocks and cannot use sink line due to hangdowns/hangups which is a major safety factor for fishermen. A few commenters believed that the lobster fishery should be exempt from having to use sinking and/or neutrally buoyant line in LMA 3 deeper than 90 fathoms (164.6 m or 540 ft). This area is very rocky. Commenters stated ropes would be on rocks and would chafe off and cause ghost gear. Another commenter stated that the Maine coast should not be regulated by "a one-size-fits-all" strategy, and that the state is divided into zones because they could not manage the areas very well by one-size-fits-all, because every zone, every town, and every fisherman has to do things differently (i.e., eastern Maine has extreme tides and York County on the other end of the state does not have much tide). Another commenter said the area south of Stonington and Boothbay have mud on the bottom, and Downeast has rocky or ledgy bottom, so the areas should be treated differently.

Response: The ALWTRP management areas were modeled after the Federal LMAs with some additional unique areas also identified. NMFS has conducted gear research in diverse habitat areas along the coast of Maine over the years and believes that fishing could be successfully accomplished in these areas using sinking and neutrally buoyant groundline. See Response to Comment 128 with respect to unique bottom types and physical environments.

Comment 148: Several commenters questioned the durability of neutrally buoyant tail warps. The commenters believed that warps made with neutrally buoyant line were not lasting as long as those made with floating line, causing more frequent gear replacement. Commenters stated the following problems with neutrally buoyant tail warps: (1) Increased chafing and burring; (2) twisting of the line around the traps; and (3) increased gear loss.

Response: There are currently many choices for fishermen in selecting non-floating line. The line manufacturers are working closely with fishermen to develop lines suitable for a variety of fishing practices. NMFS notes that the fishing industry from Maine to Florida utilized sinking and/or neutrally buoyant line successfully in a variety of applications before the advent of floating line. Some percentage of fishermen today do not use floating groundline for a variety of reasons. NMFS believes that the industry can develop work practices that will address the difficulties in transitioning from floating groundline to sinking and/or neutrally buoyant groundline. The potential for hangdowns and ghost gear may increase (see response to Comment 149).

Comment 149: One commenter said that he went out with a few others and tested the groundline/tail warp. The commenter went out with an underwater robotic camera and went from Swans Island to Jericho Bay to Isle au Haut to Deer Isle Thoroughfare. The commenter said that they put the camera down on a lot of traps and the ten fathom (18.3 m or 60 ft) tail warp was 2-3 feet (0.6-0.9 m) off the bottom. The commenter believed that this works even though

some others were 15-18 fathoms (27.4 m or 90 ft- 32.9 m or 108 ft) and standing 5-6 feet (1.5-1.8 m).

Response: NMFS appreciates this report on demonstrated line performance. NMFS will pass this comment on to the ALWTRT for consideration when low profile groundline is further discussed.

Comment 150: One commenter said that at a recent TRT meeting, a whale expert stated that as long as there is one piece of line in the entire Atlantic Ocean that it poses a serious threat to the right whale. The commenter believed that the comment sums up everything and that NMFS will eventually try to take away line all together, not just the ones discussed in the plan. The commenter said that fishing cannot be done without rope, and the technology is not there to do so.

Response: NMFS recognizes a variety of opinions exist on these issues. The options considered in this rulemaking did not include removal of all lines as NMFS recognizes this is not a technically and operationally feasible option.

Comment 151: For trap/pot gear, one commenter recommended implementing groundline modifications from September 1 to March 31 rather than to May 1. The commenter believes this will reduce gear loss and difficulty retrieving lost gear.

Response: The times and areas identified for gear modifications are based on whale sightings data. April and May are months when whales are expected to occur in the Mid-Atlantic. NMFS believes the September 1 through May 31 time period in the mid-Atlantic is appropriate. Thus, the gear modifications that reduce the threat of serious injury and mortality due to entanglement in gear are required for that gear type during these months.

Comment 152: One commenter states that 17-fathom Rocks area and wrecks should be exempted from groundline requirements because their line gets caught and can cause gear loss.

Response: NMFS recognizes that all rocky bottoms and wrecks present a risk of hangdowns for all gear types. NMFS also recognizes that sinking and/or neutrally buoyant line has been fished successfully coastwide for many years by a variety of gear types through the development and implementation of unique work practices. The 17-fathom Rocks area mentioned by the commenter has a compliance date 12 months after publication of this final rule, similar to other areas. Also see response to Comment 128 regarding sinking and/or neutrally buoyant groundline.

Comment 153: One commenter stated that sinking/neutrally buoyant groundline is the most significant feature in the DEIS. The commenter also stated that, since it is not fully required until 2008, it is difficult, if not impossible, to review the effectiveness of this plan before 2012.

Response: NMFS appreciates the comment on reviewing the effectiveness of the plan and has created a Status Report Review Committee as an outcome of the 2005 ALWTRT Meeting to discuss these issues. NMFS believes that effectiveness will be discernable before 2012.

Comment 154: Several commenters stated that none of the alternatives establish a mandated phase-in time for sinking groundline. One commenter stated that, instead of relying on requiring a certain percentage of traps to be re-rigged with sinking/neutrally buoyant groundline by predetermined dates before 2008, the alternatives rely on incentives of unknown effectiveness to encourage increased used of sinking/neutrally buoyant groundline before 2008. Further, the commenter stated that incentives allow vessels to enter areas otherwise closed to fishing because of large aggregations of right whales. The commenter stated that the DEIS does not contain any information about how many fishermen operate in those areas or how many might convert their groundline before 2008 as result of being given access to those areas.

Response: Several of the alternatives establish a mandatory date for the use of sinking and/or neutrally buoyant groundline. The commenter is correct in stating that the alternatives do not work on a percentage of traps but instead require all gear be converted by an established date. NMFS believes the required gear modifications reduce the risk of entanglement to the large aggregations of whales referenced by the commenter.

None of the alternatives in the FEIS remove time-area closures. In fact, newly regulated gillnet and trap/pot fisheries are required to abide by the current time-area closures for these gear types. The commenter may be referring to the number of vessels allowed to enter DAM areas. DAM announcements are unpredictable, making it difficult to estimate the number of vessels affected. Chapter 5 of the FEIS estimates the number of additional vessels that could be affected under the alternatives. The removal of the DAM program and the interim expansion of the SAM zone are designed to address the unpredictability of large whale distribution, and they will be replaced with broad-based gear modifications.

Comment 155: Several commenters are already rigging their gear with sinking groundline due to SAM, DAM, Massachusetts requirements, and the recent buyback program as well as individual preferences.

Response: NMFS acknowledges this fact and notes these actions may mitigate the costs of the requirements of this final rule.

Comment 156: A few commenters were concerned that having to use sinking/neutrally buoyant groundline will jeopardize their ability to make a living as fishermen in Maine.

Response: Chapter 7 of the FEIS identifies vessel segments that may be heavily impacted by comparing average vessel revenues with compliance costs. The analysis suggests that under Alternative 6 Final (Preferred), a limited number of small vessels are most at risk; about half of these are Class I vessels operating in Maine waters. While these vessels may still realize high costs relative to revenues, fishermen have some options to try to mitigate costs. For example, the impacts of converting to sinking and/or neutrally buoyant groundline may be defrayed, in

part, by current and future groundline buyback programs operated by NMFS and other partners. Further, NMFS has considered concerns about sinking and/or neutrally buoyant groundline in Maine in developing its preferred alternative, identifying additional areas off the coast of Maine that would be exempt from ALWTRP requirements. Expansion of the exempted areas would reduce the economic burden on Maine lobstermen without increasing entanglement risks. In addition, although the requirements under Alternative 6 Final (Preferred) may impose significant costs within the first year after publication of the final rule (to convert all groundline to sinking and/or neutrally buoyant groundline), fishermen may be able to distribute the cost of the new gear over its useful life by seeking a loan. After the first year, ongoing costs would be significantly lower as fishermen would only need to replace worn-out and lost gear.

Comment 157: One commenter said that a consequence of the four alternatives (Alternatives 2, 3, 4, and 6) would be that because sinking groundlines are too dangerous to employ, lobstermen will be forced to fish single traps in areas where they normally fish pairs, triples, or small trawls. The commenter also said that this will be an incredible economic burden to fishermen and it will double the amount of surface lines and buoys.

Response: See Response to Comment 128 regarding safety. The social impact analysis included in the FEIS examines the economic burden posed by the alternatives and the likely effect on the economic viability of fishing operations. The analysis identifies vessel segments that may be heavily impacted by the requirements and suggests that under Alternative 6 Final (Preferred) a limited number of small vessels are most at risk when comparing annual compliance costs to average vessel revenues.

Contrary to the commenter's assertion that the alternatives would increase the amount of surface line, the alternatives are specifically designed to reduce the amount of fishing line in the water column by requiring sinking and/or neutrally buoyant groundline and by extending sinking buoy line requirements at the surface to new fisheries not currently covered by the ALWTRP. In addition, NMFS is currently performing related research on vertical line by examining the geographic distribution of vertical line relative to whale distribution. This research will help characterize how ALWTRP requirements and other regulatory changes have influenced risk from vertical line. Additionally, NMFS has discussed and will continue to discuss options to reduce risk associated with vertical line with the ALWTRT.

1.1.11 Comments on Low Profile

NMFS solicited comments and information from the public on issues related to "low profile" groundline (e.g., prey distribution, large whale distribution and behavior, and methods for reducing the profile), and received numerous comments. As many of those comments are not directly related to the present rulemaking action, this preamble does not respond to all of the "low profile" comments received during the public comment period in this rule. NMFS will provide all comments regarding low profile to the ALWTRT at the next meeting when low profile groundline will be discussed further. NMFS and the ALWTRT will have an opportunity to review and consider these comments at that time.

Comment 158: One commenter said that the state of Maine low profile research that has been done with the underwater camera has not been taken into consideration by NMFS.

Response: As noted in the preamble to the proposed rule and DEIS, NMFS was unable to support using "low profile" groundline in the development of this rulemaking action. NMFS identified additional research and analysis necessary to determine whether lowering the profile of groundline to depths other than the ocean bottom reduces the potential for large whale entanglement in certain areas. Additionally, NMFS determined that the depth to which the groundline profile could be reduced needs to be established after more information is collected and analyzed on prey distribution, large whale distribution and behavior, and methods for reducing the profile of groundline. NMFS would need to define "low profile" line in such a way that it is enforceable, is operationally feasible for fishermen, and reduces the risk of entanglement. Presently, NMFS and others are researching all of these issues. For example, NMFS has supported groundline studies by Maine DMR since 2003, including use of a Remote Operating Vehicle (ROV) to investigate groundline profile and the experimental testing of low-profile groundline. During the development of this final rule, NMFS also conducted a series of workshops in September 2005 to gather information on low profile groundline, which included discussion of Maine's research, and was discussed at the December 2006 ALWTRT meeting. In addition, NMFS solicited comments and information on "low profile" groundline through the public comment process for this rulemaking. Thus, states and fishing industry are working with NMFS and the ALWTRT to determine if emerging technology exists to allow a conservation equivalent gear modification to sinking and/or neutrally buoyant groundline in identified areas. NMFS may consider "low profile" groundline in the future, and will be further discussing these issues with the ALWTRT at the next meeting.

Comment 159: One commenter stated that sinking line between anchors or concrete blocks and the traps is problematic as the line wraps around these anchors. The commenter believed a 6-fathom (11.0-m or 36-ft) piece of floating line or shorter piece (e.g., one to three fathoms (1.8 or 6 ft to 5.5 m or 18 ft)) is necessary in this area to avoid gear loss and would not affect risk reduction.

Response: Based on this comment regarding the line between traps and anchors, and review of the groundline definition, NMFS finds that the definition does not cover this portion of the gear. (The groundline definition "with reference to trap/pot gear, means a line connecting traps in a trap trawl, and with reference to gillnet gear, means a line connecting a gillnet or gillnet bridle to an anchor or buoy line.") NMFS did not specifically seek or receive public comment on the groundline definition related to the line between traps and anchors, and accordingly cannot make any adjustments to the definition at this time. NMFS will investigate this gear configuration through contact with fishermen and states to determine how common a practice it is in trap/pot fisheries, determine the type of line used in this portion of the gear, quantify potential risk if floating line is used, determine any new issues that may be raised by requiring sinking and/or neutrally buoyant line in this area of the gear, and discuss the appropriate management response with the ALWTRT at the next meeting.

Comment 160: One commenter said that more research on using low profile groundline (i.e., groundlines that float between traps/pots at a height no greater than 2 to 4 feet (0.6 to 1.2 m)) should be pursued by NMFS as an administrative procedure.

Reponse: Low profile groundline is not being required in this final rule. However, as noted earlier in this preamble, NMFS will be further discussing the concept of low profile groundline with the ALWTRT at the next meeting.

1.1.12 Comments on Gear Marking

Comment 161: Several commenters believe NMFS (and the Gear Research Team) need to devise a better line marking strategy to get more information about entanglements and enhance mitigation efforts. Specifically, commenters urged NMFS to require different colors to indicate the type and location of fishing gear. Several commenters suggested putting a red tracer/colored tracer fibers in floating groundline midway between each trap to see where the whales get caught in the gear. Colored tracer fibers could be input/twisted in during the manufacturing of the line; one commenter further states that no cost estimates exist for color-coding into new line manufacturing. Many commenters believe the marking should identify fishery, area fished, and part of line, such that sinking/neutrally buoyant groundline is distinguishable from floating groundline or buoy line. Another commenter suggested NMFS should develop stainless steel or nylon type bands that can be crimped around a line, or chips that can be inserted into the line, coded with fishermen identification or fishery/gear/area information, for all fixed gear fisheries and waters along the eastern seaboard. The commenters suggested that the marking should indicate state and gear type and should apply coast-wide. Several other commenters suggested gear marking requirements that are more consistent with current State, Federal FMP, and other TRT requirements.

Response: NMFS considered current State, Federal, and other TRT requirements when finalizing the gear marking requirements in this final rule. Through this final rule, NMFS will require specific color coding for fisheries and areas not previously required to mark gear. All specified gear in specified areas must be marked with a color code that represents gear type and location. NMFS has tested stainless steel or nylon type bands used around the line, and found that this causes a safety issue when the band gets caught in the hauler. NMFS also found that these bands wear out the line when being hauled, which in turn destroys the integrity of the line. NMFS is currently working on a chip technology that can be inserted into the line and coded with fishermen identification for the entire eastern seaboard which will help to more easily identify gear in the water. NMFS will discuss this technology with the ALWTRT in the future.

Comment 162: One commenter suggested that NMFS require that inshore gear at least be marked sufficiently to tell if it is risky for whales.

Response: NMFS agrees and confirms that provision was proposed and is now being implemented in this final rule. Gear in ALWTRP inshore management areas will be required to

have one 4-inch (10.2-cm) colored mark midway along the buoy line in the water column as well as surface buoy markings. Many of these inshore areas are also state-mandated to mark traps and buoy systems. NMFS is currently working on developing chip technology that can be inserted into the line and coded with fishermen information for the entire eastern seaboard which will help to more easily identify gear in the water. NMFS will be discussing this technology with the ALWTRT in the future.

Comment 163: One commenter supports the use of red tape to mark gear in LMA 2, but wants to make sure that it is clarified that if less than 60 fathoms (109.7 m or 360 ft), the mark is in the center of the buoy line.

Response: Under this final rule NMFS will not be adopting the proposed gear marking scheme for buoy lines as referred by the commenter. Rather, the gear marking scheme will require one 4-inch (10.2-cm) colored mark midway along the buoy line in the water column, regardless of the length of the line. NMFS believes this requirement is in line with what the commenter was suggesting.

Comment 164: Two commenters urged NMFS to require marking of all surface buoy systems in federal and state waters in a manner that identifies the owner/vessel such as vessel name and/or license/permit number and/or fishery.

Response: NMFS will require trap/pot and gillnet gear to mark all surface buoys to identify the vessel or fishery with one of the following: the owner's motorboat registration number, the owner's U.S. vessel documentation number, the federal commercial fishing permit number, or whatever positive identification marking is required by the vessel's home-port state. With regard to gear markings that yield individual vessel information, many of the state and Federal FMPs currently require marking of buoys and/or traps with individual vessel identification. NMFS plans to continue to work with state fisheries agencies to investigate gear marking coast-wide and identify gaps in marking of surface gear, gillnets, and traps.

Comment 165: One commenter believes buoy lines that are 50 fathoms (512.1 m or 1,680 ft) or less should have one 4-inch (0.1 m) colored mark unique to a fishery and state and for buoy lines above 50 fathoms (512.1 m or 1,680 ft) should have two marks.

Response: Based on implementation considerations and technology presently available, NMFS believes the final gear marking scheme is appropriate. If more promising techniques become available in the future, NMFS will discuss these further with the ALWTRT. See Response to Comment 163.

Comment 166: One commenter suggested marking buoy lines greater than 20 fathoms (36.6 m or 120 ft) once midway in the lines and for buoy lines greater than 100 fathoms (182.9 m or 600 ft) marking once at least every 50 fathoms (91.4 m or 300 ft) for sinking and floating buoy lines.

Response: See Response to Comment 163.

Comment 167: Several commenters supported marking buoy lines with 1 four inch (0.1 m) mark every 10 fathoms (18.3 m or 60 ft). One commenter supported the proposed gear marking scheme as long as it is not too complicated and fishermen have enough time to comply. Another commenter stated that he would mark buoy lines twice if it would help determine the origin of gear. One commenter stated that, at the last ALWTRT meeting, the team agreed that any additional requirements would be decided by a gear group.

Response: See response to Comment 163. NMFS did solicit gear marking options from the ALWTRT previously, and will continue to discuss any other appropriate gear marking schemes/strategies with the ALWTRT.

Comment 168: Many commenters object to the proposed scheme of marking buoy lines with a 4-inch (0.1 m) mark every 10 fathoms (18.3 m or 60 ft). Commenters objected to the proposed marking scheme for the following reasons: (1) It would be impossible in deep water; (2) the tape will not stick to wet rope, nor will paint. While these markings could be applied to rope when dry, adjusting the marks at sea is impossible; (3) marking techniques lose their visibility within a few weeks in the water as algal growth accumulates on the ropes making the mark hard to discern and basic wear and tear of marks; (4) gear marking would be difficult to implement as line is spliced or fouled over the course of its useful life; (5) there would be a problem in trying to figure out whether the space between marks is exactly ten fathoms (18.3 m or 60 ft) when the lines are spliced due to broken buoys, lines etc.; (6) it will be tough to mark at sea, especially given temperature, sea state, and safety considerations; (7) the proposed scheme would only identify a buoy line, but not a fishery or even a region where the gear was fished (i.e., no unique identifier), so this limits the amount of information that can be tracked and evaluated; (8) it is too time consuming, costly, impractical, and unworkable; (9) the marking scheme is generic and limited marks will not provide much information; (10) too many areas will not have marking requirements (e.g., exempted areas, recreational gear, Canadian waters); (11) gear loss would be too much with using the new gear marking; (12) it will be a financial burden to fishermen, without much chance for results that are useful; (13) buoys and traps are already marked under current lobster fishing rules; and (14) it would be hard to enforce given the large number of recreational lobstermen. One commenter states that if this provision is adopted, it might tempt fishermen to use a different color code or no marking at all to divert attention away from their sector.

Response: Based upon these comments, NMFS changes the regulations through this final rule, to require all fisheries to mark buoy lines with one 4-inch (10.2 cm) colored mark midway along the buoy line in the water column and mark surface buoys. Requiring only one mark alleviates all concerns regarding safety and other practicality issues raised by commenters. NMFS will continue to discuss gear marking strategies, factoring in safety and other concerns, with the ALWTRT.

Comment 169: Some commenters stated that fishers will be reluctant to comply with the marking scheme because there is no direct risk reduction to whales.

Response: NMFS believes that, although there is no direct risk reduction to whales, the information obtained from gear marking may assist in the management of incidental whale entanglements.

Comment 170: One commenter suggests more frequent marking of buoy lines (e.g., every 5 fathoms (9.1 m or 30 ft)).

Response: See Response to Comment 163.

Comment 171: Two commenters suggest marking the buoy lines less frequently. One commenter believes that requiring marking in lesser increments may increase compliance. One commenter believes one mark in the middle of a rope is sufficient as there is no difference between having one mark or ten marks.

Response: See Response to Comment 163.

Comment 172: One commenter believes that in the various gear marking systems proposed throughout the history of the ALWTRP, NMFS has routinely failed to: (1) incorporate and capitalize on gear marking already required in the fishery under existing take reduction regulations or FMPs; (2) augment the existing gear marking system with more frequent marking requirements to increase the probability of identifying gear type and parts (e.g., buoy line from groundline); and (3) devise a marking system that is easy, safe, and technologically feasible to implement.

Response: NMFS has capitalized on and considered other management plans as well as take reduction regulations regarding gear marking requirements. NMFS did consider more frequent marking in the proposed gear marking scheme; however, based on public comments that this is not operationally feasible, NMFS came up with the gear marking scheme that is implemented in this final rule. NMFS is currently researching a future marking system that is easy, safe, and technologically feasible to implement.

Comment 173: One commenter states than an area-specific scheme may complicate the marking strategy.

Response: NMFS does not believe that an area-specific scheme would complicate the marking strategy because an area-specific scheme already exists. However, to alleviate any possible complications, NMFS is grouping requirements for all trap/pot fisheries and for all gillnet fisheries. Where possible NMFS is expanding gear marking schemes to be consistent with existing color schemes.

Comment 174: One commenter stated that fishermen would have to replace the buoy line markings every time they move gear from shallow (e.g., 3 fathom (5.5 m or 18 ft)) to deeper water (e.g., 30 fathom (54.9 m or 180 ft)) such as what occurs along the hard bottom ridges and reefs in and beyond Casco Bay. The commenter stated that it would be time prohibitive to have

to keep replacing the lines.

Response: NMFS believes that line would not have to be replaced, but marks would have to be changed when gear is moved from shallow to deeper water in all areas and when buoy lines are lengthened.

Comment 175: One commenter supports microchip tracer technology for marking gear.

Response: NMFS agrees and is currently working on developing a microchip technology for marking gear.

Comment 176: Several commenters agree with experts who request that ropes be identifiable in aerial images of entangled whales.

Response: It is difficult to identify the gear on entangled whales in aerial images at present, but NMFS is exploring technologies such as microchip technology that will help to identify gear that is entangling whales.

Comment 177: One commenter stated that gear marking may be a problem to enforce because not many people know how much 10 fathoms (18.3 m or 60 ft) is.

Response: As a result of the difficulty in implementation, NMFS is changing the proposed buoy line marking requirement to one 4-inch (10.2 cm) colored mark midway along the buoy line in the water column.

Comment 178: One commenter would like the marking of surface buoys to be consistent with the bottlenose take reduction plan.

Response: The Bottlenose Dolphin Take Reduction Plan (BDTRP) final rule published on April 26, 2006 (71 CFR 24776), does not require the marking of surface buoys.

Comment 179: One commenter stated that the proposed scheme does not include any marking of groundline. Commenters suggested that NMFS require all parts of the gear to be marked, including sinking groundline to monitor its effectiveness; a specific color should be used to identify sinking/neutrally buoyant groundline from floating groundlines or buoy lines. NMFS should work with rope manufacturers to designate such color codes.

Response: This final rule does not require the marking of groundline. NMFS did not propose marking groundlines through this rulemaking due to the time and cost burden associated with requiring sinking and/or neutrally buoyant groundline coupled with the lack of a suitable gear marking technique that reduces burden to fishermen (e.g., costs and labor) given the amount of line used in these fisheries. NMFS will continue to discuss gear marking strategies with the ALWTRT and support research and development of promising marking technologies.

Comment 180: One commenter wanted to know what studies have been done in the Quoddy Head area. Specifically, examining the current. The current is heavy and will wash marks off. The commenter also questioned the gear marking of every 10 fathoms (18.3 m or 60 ft) and believed that it would be a lot of marking due to the amount of buoy line needed.

Response: NMFS is aware and has considered the impact of the heavy currents in the Quoddy Head area (see the report "Load Measurements in Lobster Gear" in NMFS' Large Whale Gear Research Summary (NMFS, 2002)). There are many reliable techniques available in marking or affixing the color code: the line may be dyed, painted, or marked with thin colored whipping line, thin colored plastic, or heat-shrink tubing, or other material; or a thin line may be woven into or through the line. In this final rule, the gear marking scheme will require one 4-inch (10.2-cm) colored mark midway along the buoy line in the water column.

Comment 181: One commenter stated that all gear-buoys and floats are marked by law so there are 3,000 chances to identify gear. The commenter said that most of lines are marked 4 times with license number, name, and sometimes home port.

Response: NMFS understands that there are requirements that both traps and buoys be marked in many areas. To improve the chances of identifying a gear type when neither a trap or buoy are recovered some identification on the buoy line could be helpful. Under this final rule, the gear marking scheme will require one 4-inch (10.2 cm) colored mark midway along the buoy line in the water column. Additionally, trap/pot and gillnet gear regulated by the ALWTRP must mark all surface buoys to identify the vessel or fishery with one of the following: the owner's motorboat registration number, the owner's U.S. vessel documentation number, the federal commercial fishing permit number, or whatever positive identification marking is required by the vessel's home-port state.

1.1.13 Comments on Weak Links

Comment 182: Several commenters support the proposed use of weak links/weak link regulations for the following reasons: (1) Fishermen have been cooperative in using them; (2) considerable research has already been done; and (3) weak links may reduce drowning deaths, reduce rope wounds at early entanglement stages, and lessen the effects of entanglement by allowing the whale to shed smaller lengths of gear.

Response: The continued cooperation and support from the fishing industry is essential for the ALWTRP to achieve its goals. NMFS is committed to gear research and development and intends to continue to support studies on weak links, which add a level of protection for large whales.

Comment 183: Several commenters support weak link research. One commenter suggested that NMFS determine species-appropriate breaking strengths and the best number and placement of weak links according to gear type and use. Another commenter stated that weak links on the buoy lines should be designed to break. One commenter believes that without

further research, NMFS cannot assume that the benefits of weak links to survival of whales are greater than the dangers posed by weak links; this commenter states that the greatest danger is using untested methods that could result in death and injury to whales that should have been protected by other means.

Response: NMFS is committed to gear research and development, and intends to continue to support studies on weak links to reduce interactions between large whales and commercial fishing gear. NMFS has gear laboratories and research teams that specifically focus on gear development and testing. Additionally, NMFS contracts with researchers, individuals and companies to develop gear solutions. Much of the current take reduction plan measures are based on the outcome of such gear research (e.g., weak links) conducted and/or funded by NMFS. NMFS believes that weak links add a level of protection for large whales, and in combination with other mitigation measures, serve as a valuable conservation tool.

Comment 184: Numerous commenters stated that weak links have never been proven to reduce risk and that NMFS relies too much on them. Several commenters stated that lethal and life-threatening entanglements are known to have involved gear with weak links still attached, which had breaking strengths equal to or less than what NMFS has proposed. One commenter stated that weak link requirements in current ALWTRP regulations have been in place for nearly 5 years, yet the rate of large whale entanglement has not been reduced. The commenter believes that the effectiveness of deploying weak links on gear needs to be better analyzed for entanglement prevention. Another commenter suggested weak link failure may be a result of where the weak links are being placed in the gear.

Response: There is no evidence to suggest that weak links, when designed and used properly, are ineffective. Weak links reduce the breaking strength of traditional gear. The breaking strength of weak links is based on the tractive force of animals in addition to commercial fishing practices (DeAlteris *et al.*, 2002). Weak links add a level of protection for large whales and NMFS intends to continue to support studies on weak links to reduce entanglement risk. See also Response to Comment 183.

Comment 185: One commenter agrees with using weak links in gillnets more than in buoy lines, but does not believe that NMFS has proven that 1,100-lb (499-kg) weak links are sufficiently risk averse.

Response: NMFS believes that 1,100-lb (499-kg) weak links reduce entanglement risks by reducing breaking strength of traditional gear, which ranges from 3000 to 5000 lbs (1361 to 2268 kgs). The breaking strength of weak links is based on the tractive force of animals in addition to commercial fishing practices (DeAlteris *et al.,* 2002). Should new information become available that may warrant a change to the weak link tolerances in gillnets, NMFS will consider this new information in consultation with the ALWTRT.

Comment 186: Several commenters disagreed with requiring five or more weak links with a 1,100-lb (499-kg) breaking strength per net panel. One commenter stated that modifying

gear under the proposed weak link regulations is not possible, as they will incur great financial losses during haulback. One commenter specifically suggested conducting further research to determine if this is operationally feasible for the offshore gillnet fishery in Maine.

Response: In developing the appropriate gear modifications in this area, testing has been done with offshore vessels in the Gulf of Maine. Testing showed no additional operational problems beyond those experienced in the course of traditional fishing practices. NMFS worked closely with commercial fishermen and the state of Maine to develop weak links for fishermen in this area.

Comment 187: A few commenters questioned why NMFS is proposing to retain the same breaking strength for inshore fisheries while allowing greater breaking strengths in offshore fisheries. Several commenters stated that weak link breaking strengths should be greater for offshore fisheries. One commenter believes that, for the lobster trap/pot fishery, the weak links should be 1,500 lb (680.4 kg) offshore and 600 lb (272.2 kg) inshore, and should be in place from Sept 1- Mar 31 only. Another commenter would like to see a 1,000-lb (499-kg) weak link or 1,500-lb (680.4-kg) weak link versus a 600-lb (272.2-kg) weak link in offshore waters so that there is not as much gear loss during bad weather.

Response: Several months of at-sea testing of trap/pot gear has been conducted and NMFS believes the breaking strengths in this final rule for inshore and offshore fisheries are appropriate. NMFS is reducing the breaking strength for weak links in the ALWTRP offshore management areas from 2,000 lb (907.2 kg) to 1,500 lb (680.4 kg) akin to the current weak link requirement for SAM. There is not a 600-lb (272.2-kg) weak link requirement in the ALWTRP offshore management areas. If the commenter meant to say ALWTRP nearshore management areas as mentioned above, NMFS believes the weak link requirements in this final rule are appropriate. In developing the appropriate breaking strengths, NMFS considered tide, sea conditions, weather conditions, load cell data, and size and weight of gear.

Comment 188: One commenter would like to see weak links for inshore pot fisheries be 1,000 lb (499 kg) in case the trap itself is considered a weight under the regulations.

Response: NMFS does not consider the trap itself to be a weight in the regulations. In this final rule, the ALWTRP inshore trap/pot management areas will be required to have 600-lb (272.2-kg) weak links. See response to Comment 187.

Comment 189: One commenter stated that the load testing information presented at the 2003 and 2004 TRT meetings does not support breaking strengths as strong as presented for many trap/pot fisheries, as well as offshore fisheries. The proposed rule (70 FR 35903, June 21, 2005) notes that load cell testing showed a strain of 320 lbs (145.1 kg) was necessary to haul the gear, therefore, allowing a breaking strength of almost 4 times that is excessive and likely to pose greater risk to whales than is necessary.

Response: The Cordage Institute establishes safety standards for rope, and has come up

with a safety factor, or safe working load of 10 in applications such as commercial fishing. See response to Comment 187.

Comment 190: One commenter stated that in Cape May, New Jersey, the fishermen have a lot of trouble with 50-foot (15.2-m) sport boats hanging on buoys, and at night in canyons you can see 20-30 boats hanging on every one of the buoys. The commenter believed that the 1,500-lb (680.4-kg) weak links could not hold a 50-ton sport boat. The commenter believed that this is the biggest concern with the weak links in the offshore fishery.

Response: NMFS will share this information with law enforcement officials and encourages the commenter to work with local law enforcement in an effort to address this issue.

Comment 191: One commenter believes that it is inequitable to allow gillnetters to use 1,100-lb (499-kg) weak link when traps/pots have to use 600-lb (272.2-kg) buoy line weak links. One commenter questions if a 1,100-lb (499-kg) weak link is sufficient throughout the coastline. The commenter stated that while it is appropriate in some areas, others areas like Stellwagen Bank and Jeffreys Ledge may be able to use 600-lb (272.2-kg) weak links. The commenter is concerned about young whales not being able to break free. The commenter recommends that NMFS explore feasibility of 600-lb (272.2-kg) weak link for certain high-use areas such as Stellwagen Bank, Jeffreys Ledge, and other inshore areas. The commenter states there have been no failures in approximately 3,600 hauls.

Response: NMFS developed weak link breaking strengths for gillnet and trap/pot fisheries based on load cell testing of surface systems as well as operational issues. In this final rule, NMFS lowered weak link breaking strengths for some fisheries and management areas. NMFS believes the weak link breaking strength requirements in this final rule, including those for Stellwagen Bank and Jeffreys Ledge, are as low as is practical. Further reductions, if required as broad based management measures, could jeopardize safety.

Comment 192: One commenter stated that all state waters should be exempt from weak link requirements for inshore gillnets (strikenets).

Response: This final rule does provide an exemption from the ALWTRP requirements in bays, harbors, and inlets in state waters where whales occur rarely if at all. However, those waters that are not exempt are subject to the ALWTRP requirements. NMFS believes anchored gillnet fisheries in regulated state waters should be subject to weak link requirements because large whales are likely to occur in these areas during the seasons specified under this final rule.

Comment 193: One commenter believes the breaking strength calculation is not appropriate (i.e., considered by some to be “arbitrary”) and is only based on fishing practices.

Response: NMFS disagrees with the commenter and believes that the weak link requirements described in this final rule are appropriate and based on appropriate calculations. In developing the appropriate breaking strengths, NMFS considered tractive force of right

whales, tide, sea conditions, weather conditions, load cell data, and size and weight of gear (DeAlteris et al., 2002). See response to Comment 183.

Comment 194: Several commenters prefer 2,000-lb (907.2-kg) buoy line weak links (rather than 1,500-lb (680.4-kg)) from September 1 - March 31 because of issues related to weather, wind, and tides throughout the fall and winter. Further, the commenters state that grappling is hazardous and stronger links will reduce ghost gear. One commenter believes there is no evidence to require gillnets set in deep water to have weak links. The commenter questions whether they would be recovered intact, especially given tidal and storm impacts to nets.

Response: Gear research conducted by NMFS and the fishing industry does not support these concerns. NMFS believes the weak link requirements described in this final rule are appropriate. NMFS collected load cell data in offshore areas during the time period suggested by the commenter, which support the effectiveness of 1,500-lb (680.4-kg) weak links. With regard to the hazards of grappling, see Response to Comment 128.

Comment 195: Several commenters suggested method alternatives to the proposed weak link configuration/measures such as: (1) rigging nets with weak lines (ropes of appropriate breaking strength) that meet breakaway standards instead of with multiple weak links. For example, if the breaking strength of vertical breastlines are less than 1,100 lb (499 kg), the commenter believes a weak link should not be required; (2) using 4 weak links per net panel rather than 5, with a single weak link in the center of the panel's headrope, and one at each end of the headrope within the bridles; (3) using one weak link between net panels plus a weak link in the center of each net panel and one at either end of net before the anchor and buoy system; for the up and down line, the commenter suggests rope of appropriate breaking strength of 1,100 lb (499 kg);(4) using one weak link in the middle of the panel and one weak link in the bridle between nets (instead of using of three weak links in the float line of 50-fathom (91.4-m or 300-ft) net panels); and (5) using 1,100-lb (499-kg) weak rope for the floatline.

Response: Based on public comments, NMFS makes a change from the proposed rule to allow two weak link configurations for net panels in a string (See "Changes from Proposed Rule"). Details for the two configurations can be found in the "Anchored Gillnet" section of the "Northeast Gillnet Waters" section of this preamble. For further description and a diagram of the two configurations see Figure 4 in this preamble. The breaking strength of each weak link must not exceed 1,100 lb (499 kg) and the weak link requirements apply to all variations in panel size. Elements of the two weak link configurations are similar to aspects of the above comments. In addition, if rope of appropriate breaking strength is used throughout the floatline or up and down line, or if no up and down line is present, then individual weak links are not required.

Comment 196: One commenter supports one weak link at intervals no less than every 25 fathoms (45.7 m or 150 ft) in gillnets.

Response: Based on gear research conducted by the Gear Research Team, NMFS

believes weak links placed no greater than every 25 fathoms (45.7 m or 150 ft) along the floatline for gillnet net panels is an appropriate mitigation measure for gear returned to port in the Mid- and South Atlantic. The net panels are typically 50 fathoms (91.4 m or 300 ft), so this requirement ensures one weak link per net panel.

Comment 197: One commenter opposes one 1,100-lb (499.0-kg) weak link per panel for gillnets returning to port. The commenter uses "strike nets" and catches croaker close to the beach in New Jersey state waters from August to November. The commenter states there has been extensive observer coverage in the last 4 years (72 observed trips) and no reported entanglements.

Response: In the Mid-Atlantic, only one weak link per net panel is required for nets returning to port with the vessel. To account for differences between nets returning to port and those not returning to port with the vessel, more weak links per net panel will be required for nets not returning to port. NMFS acknowledges that few interactions between large whales and commercial fisheries have been observed and recorded by NMFS observers. These are rare events; however, they are occurring at a rate unsustainable for these large whale populations.

Comment 198: One commenter believed the 25-fathom (45.7-m or 150-ft) weak link belongs between the net and not on ends. The commenter claims it is easier and less burdensome and it also accomplishes the same thing.

Response: Based on research conducted by the Gear Research Team, NMFS believes that the configuration specified in this final rule for net panel weak links is the most appropriate measure. See responses to Comments 195 and 196.

Comment 199: One commenter would like clarification on the wording of weak link for up and down lines as most fishermen call them breastlines. One commenter stated that weak links should not be required in breastlines in those fisheries where the breastline is composed of twine.

Response: The up and down line is defined as the line that connects the floatline and leadline at the end of each net panel. For further details on weak link configurations for net panels, see response to Comment 195. NMFS notes in this final rule that, if rope of appropriate breaking strength is used throughout the floatline or up and down line (i.e., breastline) or if no up and down line is present, then individual weak links are not required. Thus, if the breastline is composed of twine, as long as it is of appropriate breaking strength, then individual weak links would not be required.

Comment 200: A few commenters believe that the use of breakaways or weak links in beach seine gear is going to be a problem. They believe that if the weak links break the net will hang down on the beach and the net will rip. Also, the weak links will break when hauling, and the 1,100-lb (499.0-kg) weak link affects the hang.

Response: At this time, NMFS is not regulating gillnets that are anchored to the beach and subsequently hauled onto the beach to retrieve the catch. This fishing technique is known to occur on the beaches of North Carolina. NMFS will be discussing what the appropriate management measures for this unique fishery should be with the ALWTRT at future meetings. In the meantime, NMFS will be conducting outreach and research on this fishery to support future discussions with the ALWTRT. NMFS will be coordinating with the North Carolina Department of Marine Fisheries to revise the definition for beach-based gear to help ensure landings are reported accurately for beach-based gear versus gillnets, among other issues.

Comment 201: One commenter said that 1,500-lb (680.4-kg) weak links cannot be purchased. The commenter said that the person who makes weak links will not make them because nobody buys 1,500-lb (680.4-kg) weak links.

Response: NMFS disagrees. Weak links with a breaking strength of 1,500 lb (680.4 kg) are currently available on the market.

Comment 202: One commenter states that it seems clear from observations of whales that they thrash upon becoming entangled and this may reduce efficacy of weak links. Perhaps placing a weak link at the bottom of vertical lines would allow an animal to pull free with more ease but it can still wrap itself.

Response: Currently, little is known about whales' behavior upon encountering gear. Weak links placed at the bottom of the vertical line could present safety issues as well as problems retrieving gear. NMFS intends to continue to support studies on weak links to reduce the risk to whales.

Comment 203: One commenter suggests certain strengths of weak links for different parts of the year.

Response: This final rule requires weak link breaking strengths based on management areas and does not have a seasonal component to them. However, in special management areas, weak link breaking strengths are lowered during certain times of the year when right whales are present. The commenter is encouraged to work with the NMFS Gear Research Team to develop additional gear research deemed necessary.

Comment 204: One commenter said that where he anchors in southern New England, it is mostly mussels and hard bottom. Usually, the net gets wrapped in mussels and rocks and it will not go anywhere when something hits it. But, years ago, scallopers would hit his nets and go right through them, taking that section of the net right out, without breakaways (i.e., weak links). The net does not move when it is hit, it gets shredded.

Response: NMFS recognizes that nets not properly anchored can easily move across the bottom, as well as up and into the water column. Consequently, research has been conducted to establish anchoring requirements that are appropriate for the weak links in the gillnet panels.

Comment 205: One commenter was concerned about weak links in net panels south of 29° 00′ N. causing gear loss in the southeast because the gear is hauled over the stern. The commenter said that fishermen do not need weak links in the southeast as gear is tended, the nets are shorter, effort is low, and the size of the fishery is small. The commenter also said that fishermen are required to move gear if a whale comes near the gear.

Response: NMFS conducted research on several vessels in the southeast region and found that the non-shark gillnet gear could be fished with weak links. These weak link requirements are similar to the Mid-Atlantic where some fisheries are conducted similar to those in the southeast. Weak links are one of the broad-based gear modifications that NMFS is implementing through this final rule. However, in the Southeast, weak link requirements are only applicable to non-shark gillnet fisheries (i.e. not shark gillnet fisheries).

Comment 206: Two commenters cited problems with weak links and heavy boating traffic. One commenter believed that weak links are easily broken due to heavy pleasure boat traffic. The other commented stated a loss of 10-percent of his buoys due to boat traffic.

Response: Pleasure boats causing loss of surface systems is not necessarily due to the fault of the weak link. Based on the result of at-sea testing, NMFS believes the breaking strength requirements are appropriate.

Comment 207: One commenter states that weak links are unnecessary in shoal waters because they pose a problem when changing lines, plus whales would hit the bottom if they entered these areas. However, the commenter understands that whales could be in 40-50 fathom (73.2 m or 240 ft- 91.4 m or 300 ft) water.

Response: NMFS has determined based on its understanding of current fishing practices that placing weak links as close to the buoy as operationally feasible presents little problem when changing buoy line, whether the trap is in shoal or deep water.

1.1.14 Comments on Vertical Lines (or Buoy Lines)

NMFS solicited comments and information from the public on issues related to vertical line (e.g., how whales utilize the water column, gear modification options). Those comments related to this rulemaking action are responded to below. Those comments that are outside the scope of the present rulemaking action are not responded to in this final rule, but will be provided to the ALWTRT at the next meeting, when options for reducing risk associated with vertical lines will be discussed further. NMFS and the ALWTRT will have an opportunity to review and consider these comments at that time. It is important to note that NMFS provided the ALWTRT with a list of management options to reduce risk associated with vertical line to support future discussion on this issue. Additionally, NMFS is funding an analysis to evaluate the effectiveness of current and/or future fishing effort reductions in decreasing the amount of vertical line in the water column. This information will be provided to the ALWTRT at the next meeting to assist in the discussion and development of recommendations to NMFS on reducing

risk associated with vertical line.

Comment 208: A few comments were received that claimed that the DEIS was inadequate because it only dealt with half of the entanglement risk to large whales. The commenters referenced the Johnson *et al.* (2005) analysis which was provided in the DEIS and indicated that entanglements occur in both groundline and vertical lines on an equal basis. Some commenters believe NMFS has not quantified the net change in risk (between one buoy line or two) or the biological impacts and has not offered a compensatory risk reduction measure.

Response: NMFS considered the Johnson *et al.* (2005) analysis that examined the fishing gear involved in right and humpback whale entanglements. According to Johnson *et al.* (2005), any line rising into the water column presents an entanglement risk to large whales. While it may appear from this analysis that buoy and surface system lines represent a greater entanglement risk to large whales than groundlines do, both the authors of the analysis and the DEIS note that it is difficult to compare the relative risks associated with these parts of fixed gear for a number of reasons. There are many uncertainties associated with entanglements; for example, the history of a particular entanglement may not be fully reflected from the gear recovered or the location of gear on a whale's body when an entanglement is first reported. There are also biases associated with entanglement reporting effort, as well as a lack of information about the types and amounts of gear currently in use. In addition, it is possible that entanglements in buoy lines are reported more frequently at sea than entanglements in groundline, as buoy lines are easier to identify based on the presence of a buoy or high flyer. Groundline does not have any distinguishing characteristics that would make it easy to identify; thus, this part of the gear can usually only be identified if gear has been recovered from an entangled whale, and even then it is difficult to determine the part of the gear that piece of line came from. Johnson *et al.* (2005) state that, despite gear recovery and/or identification, 44 percent of the entanglement events analyzed in the study involved an unknown part of the gear. The study confirms that vertical lines and floating groundlines pose risks for large whales. NMFS believes that addressing the risk associated with floating groundline by requiring the use of sinking and/or neutrally buoyant groundline will reduce serious injury and mortality of large whales due to incidental entanglement in commercial fishing gear. As noted in the DEIS and FEIS, NMFS believes that further research and discussions with the ALWTRT are needed to address risks associated with vertical line.

At this time, neither the ALWTRT or NMFS is able to identify a viable option for further reducing the risk associated with vertical lines. NMFS has, in fact, concluded that requiring the use of one buoy line may encourage fishermen to split trawls or strings, thus increasing the number of vertical lines in the water column. In addition, requiring one buoy line may increase the risk of gear loss, thereby increasing the entanglement risks associated with "ghost gear" or fishing gear left untended or lost that continues to fish. Therefore, this would not be an effective broad-based measure to implement. NMFS will work with the ALWTRT to address the risk associated with vertical lines through future rulemaking.

Comment 209: Several commenters prefer the single buoy line requirement in SAM. One commenter stated that this would decrease the number of buoy lines in the water, which

offsets the amount of ghost gear created from gear lost due to weather, gear conflicts, etc. Another commenter suggested using one buoy line in Cape Cod Bay, Great South Channel, Stellwagen Bank/Jeffreys Ledge, other Northeast gillnet waters, SAM, Mid-Atlantic Coastal waters, and other Southeast gillnet waters.

Response: As noted in Comment 208, neither the ALWTRT nor NMFS is able to identify a viable option for further reducing the risk associated with vertical lines at this time. NMFS has concluded that allowing the use of two buoys in SAM areas as specified in this final action will not result in an increase in the amount of vertical line in the water. NMFS will work with the ALWTRT to address the risk associated with vertical lines through future rulemaking.

Comment 210: Many commenters supported the use of two buoy lines for the following reasons: (1) It would reduce the number of buoy lines in the area; (2) it would make gear easier to grapple; (3) it would help reduce gear loss/ghost gear; and (4) it would provide for safer hauling conditions.

Response: NMFS supports and allows the use of more than one buoy line. However, NMFS notes that Cape Cod Bay (January 1-May 15), Northern Nearshore Lobster Waters, Stellwagen Bank/Jeffreys Ledge Restricted Area, and Cape Cod Bay Restricted Area (Federal Waters May 16-December 31) currently have minimum limits on the number of traps per one buoy line. See response to Comment 208.

Comment 211: Many commenters supported 2 buoy lines for trawls of 5 or more traps.

Response: NMFS agrees with the commenters that 2 buoy lines are needed for many fixed gear fisheries. However, see response to Comment 208. NMFS notes that Cape Cod Bay (January 1-May 15), Northern Nearshore Lobster Waters, Stellwagen Bank/Jeffreys Ledge Restricted Area and Cape Cod Bay Restricted Area (Federal Waters May 16-December 31) currently have minimum limits on the number of traps per one buoy line. See response to Comment 213.

Comment 212: One commenter supports a second buoy line in SAM. The commenter believes this will cut the overall numbers of buoys in SAM. Currently, most people have 2-3 traps on a buoy line because the traps are too expensive to risk setting more on a single buoy line. Thus, if NMFS allowed a second buoy line, there would be fewer small sets of gear and less buoys, and the risk for gear loss would also be reduced.

Response: As discussed in the Response to Comment 209, the use of two buoy lines is allowed in SAM areas through this final action. Additionally, see response to Comment 211 for a reminder of the areas where minimum limits on the number of traps per one buoy line are required.

Comment 213: Several commenters did not support the use of one buoy line per trawl of 4 or fewer traps. The commenters state that this may cause fishermen to shorten trawl lengths

and/or split their trap trawls to minimize losses and maintain the current number of traps in use. This may then cause an increase in the number of buoy lines in the water column.

Response: NMFS will further address issues related to serious injury and mortality due to vertical lines through future rulemaking. In regard to the number of buoys per trawl allowed, this final action will maintain the status quo (i.e., one buoy line per trawl of five or less traps) for the various management areas that were under consideration. Therefore, NMFS is rejecting the alternative considered in the DEIS that allows the use of one buoy line per trawl of 4 or less traps. NMFS recognizes the concern raised by the commenters that some individuals may shorten trawl lengths, thereby resulting in additional buoy lines being deployed under the current management regime. As noted, NMFS intends to work with the ALWTRT to address the risk associated with vertical lines through future rulemaking.

Comment 214: Some commenters believe there is no justifiable basis for allowing two buoy lines (other than to avoid gear loss).

Response: NMFS has received reports indicating that allowing only one buoy line may cause some fishermen to split their trawls and fish shorter trawls, which can result in the same or a greater number of buoy lines. In addition, requiring fishermen who traditionally fished longer trawls with two buoys to use a single may present a safety hazard for fishermen. Having a single buoy dictates the direction from which fishermen can haul/retrieve their gear. Depending on the sea state, this may place the crew and vessel in harm's way if the vessel is not in the preferred and/or more stable hauling position. Having the choice to start a haul from either end of a string allows fishermen to choose the safest and most stable vessel direction relative to wind and sea conditions. In addition, the use of a second buoy line on trawls/strings of gear could provide a platform for continued testing of new buoy line modifications designed to address the threat of vertical line entanglements. Several potential gear modifications that offer opportunities to reduce the serious injury and mortality due to vertical lines are under investigation (e.g., Time Tension Line Cutter (TTLC), acoustic pop-up buoys, the use of buoy line retrieval line or tag line (made from line with a reduced breaking strength) marking the gear's position, acoustic hauling/release links and galvanic timed release devices).

Comment 215: One commenter states that one buoy line for four or fewer traps is less restrictive than one buoy line for five or fewer and this will increase the number of buoy lines in the water column, which represents a relaxation of the current requirement. Further, the commenter states there is no way to measure the benefits of relaxing this requirement.

Response: As discussed in the Response to Comment 213, this action will maintain the status quo (i.e., one buoy line per trawl of five or less traps) thereby rejecting the alternative considered in the DEIS that allows the use of one buoy line per trawl of four or less in certain management areas.

Comment 216: Two commenters said NMFS should minimize the number of knots in buoy lines or require knot-free buoy lines.

Response: NMFS currently encourages, but does not require, fishermen to maintain knot-free buoy lines. While splices are considered less of an entanglement threat and are preferable to knots, NMFS recognizes that such a requirement is not practical, has safety concerns, etc. However, NMFS has encouraged the development of a device that makes knotless connections. If such a device is developed in the future, NMFS will revisit the issue at that time.

Comment 217: Several commenters support allowing 1/3 poly on the bottom of buoy lines.

Response: Through this final action, fishermen have the option to use buoy lines with the bottom 1/3 of the line composed of floating line within SAM areas and Cape Cod Bay during the restricted time periods. The remainder of the line must be composed of sinking and/or neutrally buoyant line. Outside of SAM areas and Cape Cod Bay, fishermen have the option to utilize buoy lines composed of what ever type of rope they choose as long as no buoy line is floating at the surface. Following 12 months after publication of this final rule, fishermen will have the option to utilize the type of buoy line they choose to use in current SAM areas, again, as long as no buoy line is floating at the surface.

Comment 218: Two commenters requested to use more floating line in buoy line than what was proposed. One commenter stated that if fishing in 50 fathoms (91.4 m or 300 ft) of water fishermen need more because if they use sinking line, the tide will take down the buoy, but if they use more floating line then they can use less buoy line. The commenter said that floating line helps keep the line on the surface and that they need more than 2/3 floating line in heavy tides. Another commenter said he uses 1/2 to 2/3 floating line in his buoy line. Also, if he was required to only use 1/3 poly at the bottom, he would have to use toggles, which are a safety hazard to fishermen.

Response: As discussed in the response to Comment 217, outside SAM areas and Cape Cod Bay, fishermen have the option of utilizing the type of buoy line they choose as long as there is no buoy line floating on the surface. The option to use buoy lines with the bottom 1/3 of the line composed of floating line applies only to the SAM areas and Cape Cod Bay during the restricted time periods and is not one of the broad-based measures implemented by this final action. Following 12 months after publication of the final rule, fishermen will have the option to utilize the type of buoy line they choose to use in current SAM areas as long as no buoy line is floating at the surface.

Comment 219: One commenter said that floating rope does not float on the surface of the water like NMFS thinks it is.

Response: NMFS recognizes that a number of factors may affect the profile of buoy line and groundline in the water, including tide and current. In the case of groundline, underwater video recordings of typical trap/pot gear with floating groundline between traps revealed that the line often forms large loops in the water column between traps. While there is currently no definition for “floating rope”, this final rule provides definitions of “neutrally buoyant line” and

"sinking line" (see section 229.2). Under the ALWTRP, buoy line floating at the surface is universally prohibited.

Comment 220: One commenter states that the use of neutrally buoyant line has not been proven for buoy lines in all conditions.

Response: Presently, fishermen use neutrally buoyant line for buoy line in active fishing operations. In addition, a recent modeling study conducted by the Massachusetts Department of Marine Fisheries compared the profiles of buoy lines of different proportions of floating, sinking and neutrally buoyant rope under a variety of currents. The modeling results indicate that, except for at all but the lowest of currents, buoy lines showed similar profiles regardless of line composition (i.e., sink, float, neutrally buoyant). Finally, it is known that fishermen have experimented with neutrally buoyant rope as buoy lines since the late 1990s and continue to use it.

Comment 221: One commenter states that the bottom 1/3 floating line on buoy lines should be allowed in SAM. He also stated that flume experiments showed that leaving the bottom 1/3 as floating line did not pose a problem to the whales and also prevented the traps from "rocking down" (i.e., hanging down). He states that floating groundline is the cause of most entanglements, and that there is more groundline in the ocean than buoy line, thus groundline should be regulated more than buoy line.

Response: See Response to Comment 217.

Comment 222: One commenter states that a clip is needed to take buoys off the line.

Response: Clips to facilitate removal of buoys are not prohibited as long as they are located above the strong end of the weak link in the buoy line.

Comment 223: One commenter states that, for vertical line in 30 feet (9.1 m) water, there are 150 feet (45.7 m) of vertical line. In the bay with less current, any sinking rope has a tendency to get wrapped around the anchor.

Response: See Response to Comment 217.

Comment 224: One commenter said that, if sinking vertical lines are required, people are going to use toggles and they are going to tie or snap-on toggles to the vertical line. These toggles will keep rope straight up which is going to produce more stuff for whales to drag around.

Response: See response to Comment 217.

Comment 225: One commenter said that no options were considered other than weak links.

Response: In addition to weak links, a number of options to reduce the risk of serious injury and mortality due to vertical lines have been considered. While the alternatives considered in this proposed rule focus primarily on reducing risks associated with groundlines, NMFS is responding to the vertical line issue through such measures as expanded gear marking, reducing the breaking strength of weak links, regulating additional fisheries under the ALWTRP, and considering two buoy lines allowed per trawl or string. As a result, NMFS is outlining a strategy to reduce interactions with groundlines in this final rule, along with some measures to address vertical lines, and plans to further address the risk associated with vertical lines through future rulemaking. In addition, research into reducing the risk associated with vertical line is ongoing. This research is focusing on the profiles of vertical line with different buoy line configurations (e.g., sinking and/or neutrally buoyant vs. polypropylene), as well as other modifications (e.g., requiring a minimum number of traps per trawl in certain areas). NMFS and others are also investigating how whales utilize the water column, including foraging ecology and diving behavior, which will help determine the appropriate mitigation strategies for reducing entanglement risk from vertical lines.

Comment 226: One commenter stated that fishermen use a knot in the middle attached to a buoy to keep sinking line off the bottom and asked that we not eliminate buoy line with 2/3 sinking line on top spliced to 1/3 floating line on the bottom, which is more whale-friendly.

Response: NMFS currently encourages, but does not require, fishermen to maintain knot-free buoy lines. See Response to Comment 217.

1.1.15 Comments on Gillnets

Comment 227: One commenter cannot see how gillnets can ever be modified such that they are risk-free to whales, unless a pinger modification is found that works with no adverse effects.

Response: NMFS believes that the required gear modifications will prevent entanglements where possible and reduce the severity of entanglements due to gillnet gear and will reduce the risk of serious injury or mortality. At this time, NMFS does not believe that Acoustic Deterrent Devices (ADDs or pingers) and Acoustic Harassment Devices (AHDs) are an appropriate measure to reduce interactions with large whales. ADDs (or pingers) and AHDs are audible alarm devices which warn small cetaceans and pinnipeds away from commercial fishing gear and aquaculture operations by emitting sound pulses. No evidence exists that large whales would, in fact, respond to such a sound signal. In addition, exposure to alarm or alerting stimuli may result in whales abandoning a desired feeding or mating area, which could result in significant adverse effects on the population. Finally, ADDs typically operate at much higher frequencies (e.g., about 12kHz) than right whales generally hear and vocalize (e.g., less than 4kHz).

Comment 228: One commenter suggested that NMFS implement gillnet measures year-

round everywhere, including the Southeast.

Response: The potential for entanglement of whales in the south and Mid-Atlantic waters during summer months is minor. Therefore, the year-round requirements offer only minimal risk reduction compared to the seasonal requirements provided in this final rule, which are based on the movement and sightings of whales.

Comment 229: One commenter urged NMFS to prohibit gillnets from Stellwagen Bank National Marine Sanctuary.

Response: See response to Comment 16.

Comment 230: NMFS received one comment in support of the 22-lb (10-kg) Danforth-style anchor.

Response: NMFS agrees that the 22-lb (10-kg) Danforth-style anchor is appropriate based on research and testing and has implemented this provision in this final rule.

Comment 231: One commenter opposed the anchoring requirement for "stab nets" in the Mid-Atlantic.

Response: In Mid-Atlantic gillnet waters, the anchoring requirement is only in effect when anchored gillnets do not return to port with the vessel. Therefore, this final rule does not contain an anchoring requirement for stab nets returned to port with the vessel.

Comment 232: Several commenters cautioned that many of the proposed gear modifications (e.g., the use of sinking line, weak links and 22-lb (10.0-kg) Danforth anchors) pose considerable safety risks to fishermen. These commenters advised that sinking line will snag on jagged bottom surfaces, weak links could snap during hauls, and Danforth anchors will be dangerous to retrieve in rough seas. One commenter also stated that the difficulty of retrieving Danforth anchors in adverse conditions will lead to more anchors being left on the bottom and force fishermen to buy already-expensive replacement anchors more often.

Response: Safety issues are always a concern to NMFS. NMFS believes that the gear modifications required under the ALWTRP do not present significant increased dangers above those of normal fishing practices. However, NMFS will continue to monitor this situation through discussions with industry and the ALWTRT.

All three modifications stated by the commenters were tested in the Northeast, Mid-Atlantic, and Southeast regions under diverse weather conditions and were found to be successful. Although NMFS tested Danforth-style anchors in unfavorable weather conditions, fishermen should contact the NMFS Gear Research Team if they experience problems. This final rule states that gear has to be anchored at each end of the net string with an anchor that has the holding power of at least a 22-lb (10.0-kg) Danforth-style anchor, not necessarily a Danforth anchor. However, fishermen in the Mid-Atlantic and Southeast do not have an anchoring

requirement unless they return to port without their gear. Additionally, NMFS is approving a weak link anchoring option for gillnet fisherman within 300 yards (274.3 m or 900 ft) of the beach in North Carolina to alleviate safety issues in this area. NMFS gear specialists are available to consult on these issues and to provide suggestions on how to comply with this requirement. In response to any safety risks posed by weak links, gear research studies that involved pulling a string of nets in the Gulf of Maine in up to 45 knots (51.8 mi/hr or 83.3 km/hr) of wind in 100 fathoms (182.9 m or 600 ft) of water and utilizing 1,100-lb (272.4-kg) weak links resulted in no failures. Thus, NMFS believes that it is unlikely that the weak links in the gillnets would break during fishing operations. The NMFS Gear Research Team will continue to investigate weak links and various anchoring systems. For a response to safety issues related to sinking line, see response to Comment 128.

Comment 233: Two commenters do not support an 1,100-lb (499-kg) weak link for driftnets fished at night. They state that nets are 50-60 ft (15.2-18.3 m) deep, are not strong enough, catch fish like bluefish and albacore, and can break easily and create ghost gear if weak links are required. The fishery is from May to July. They state that there has been observer coverage the last 4 yrs (36 trips) and no entanglements were observed.

Response: NMFS is not implementing the proposed weak link requirement for tended driftnet gear at this time due to potential safety issues that were raised. Thus, NMFS believes further research on this fishery, and specifically testing weak links in drift gillnet gear, is needed before weak links should be required. NMFS will conduct research in this fishery and discuss whether additional requirements are warranted with the ALWTRT. NMFS acknowledges that few interactions between large whales and commercial fisheries have been observed and recorded by NMFS observers. These are rare events; however, they are occurring at a rate unsustainable for the large whale populations covered by the ALWTRP.

Comment 234: One commenter encouraged NMFS to require 600-lb (272.2-kg) weak links on all flotation devices attached to the buoy line of driftnet gear.

Response: Driftnet gear will have requirements under this final rule; however, buoy line weak links will not be required. NMFS will discuss whether additional restrictions are warranted for the driftnet fishery with the ALWTRT.

Comment 235: Several commenters were concerned about the current requirement that driftnets be attached to the boat at all times at night. The commenters stated that certain types of driftnets used in the Mid-Atlantic region would not fish properly if the net is constantly attached to the boat.

Response: Presently, this requirement applies in the Mid-Atlantic from December to March under the ALWTRP. This final rule extends this requirement from September to May. NMFS will raise this issue for further discussion with the ALWTRT at future meetings. However, at this time, NMFS is not aware of driftnet fisheries that release the net from the vessel at night.

1.1.16 Comments Specific to Certain Fisheries/Additional Fisheries Under the ALWTRP

Comment 236: One commenter states that testing is needed on the beach seine fishery, which is a selective type of fishing.

Response: At this time, NMFS is not regulating gillnets that are anchored to the beach and subsequently hauled onto the beach to retrieve the catch. This fishing technique is known to occur on the beaches of North Carolina. NMFS will be discussing what the appropriate management measures for this unique fishery should be with the ALWTRT at a future meeting. In the meantime, NMFS will conduct outreach and research on this fishery to support future discussions with the ALWTRT. NMFS will be coordinating with the North Carolina Department of Marine Fisheries to revise the definition for beach-based gear to help ensure landings are reported accurately for beach-based gear versus gillnets, among other issues.

Comment 237: Several commenters state that recreational fisheries are currently not covered under the plan and should be regulated under the ALWTRP and, in some areas, such as southern New England, they comprise a great deal of fixed gear. One commenter states that all fixed gear, whether it be from recreational or commercial fisheries, should be regulated similarly.

Response: NMFS appreciates the concerns raised by the commenter and reiterates that NMFS currently issues regulations to reduce marine mammal serious injuries and mortalities during commercial fishing operations as mandated by MMPA section 118. The MMPA does not currently authorize the Secretary to address marine mammal bycatch from non-commercial fisheries. However, recreational fishers that take marine mammals are in violation of the MMPA prohibition against taking marine mammals. NMFS has created brochures designed to inform recreational fishermen about protected species conservation.

Comment 238: One commenter requested that NMFS consider regulations that prohibit recreational boats from leaving vessel anchoring systems to occupy a fishing spot without actually fishing there. The commenter believes recreational vessels should be prohibited from tying up to fixed gear high flyers because it is doubtful that a 1,500-lb. (680.4-kg) weak link would hold a recreational vessel. The commenter believes this practice increases gear loss in the Mid-Atlantic.

Response: See response to Comment 237 for legal authorization to regulate recreational fisheries. See also response to Comment 190 regarding vessels tying onto other vessels' line. It is unlawful, however, for any person to steal or attempt to steal or to negligently and without authorization remove, damage, or tamper with fishing gear owned by another person located in the EEZ.

Comment 239: Several commenters urged NMFS to investigate emerging fisheries (e.g., whiting fishery and octopus fishery in Florida) that could use fishing gear that poses a threat to whales.

Response: NMFS currently publishes the Atlantic Ocean, Gulf of Mexico, and Caribbean Category I & II List of Fisheries under the Marine Mammal Authorization Program (MMAP) and includes both state and Federal waters. In addition to the current list of fisheries managed by NMFS, any new or emerging fishery operating in Federal waters that are federally managed is subject to section 7 consultation under the ESA. NMFS also works closely with the fishing industry, state management agencies and any interested partner as part of the ALWTRT to understand any new and emerging fisheries that may present a risk to large whales.

Comment 240: One commenter understands incorporating other fisheries in addition to those already subject to the ALWTRP, but pot fisheries such as scup, black sea bass, and conch occur early summer to fall, and the commenter believes right whales are unlikely to reside in waters where and when this gear is fished. The commenter requested that NMFS examine sightings and exempt Rhode Island state waters. Another commenter wonders about risk reduction from adding in smaller fisheries like black sea bass and scup. The commenter believed that the risk reduction may be minimal and duplicative.

Response: NMFS established the areas and seasons being implemented in this final rule by analyzing databases that included right, humpback, and fin whale sightings. The areas included in the final rule are, amongst other factors, those where documented large whale sightings are common. NMFS believes that the final rule has an appropriate suite of conservation measures to minimize entanglements resulting in serious injury or mortality to large whales.

It is true that few scup and black sea bass vessels operate relative to other trap/pot fisheries, such as the lobster fishery. However, over 400 vessels are permitted for black sea bass trap/pot in the northern fishery and over 300 vessels are permitted for scup trap/pot. Harvest data also suggest that southern vessels seek black sea bass as a principal or secondary target species. Therefore, the amount of gear associated with these fisheries is significant. The addition of these fisheries to the ALWTRP is equitable given that the gear and geographic distribution of effort are similar to the lobster fishery.

Comment 241: One commenter believes that risk reduction is greatest from adding in the hagfish fishery. Also, the commenter states that other fisheries added in do not have the same amount of effort, but that adding them should provide some benefit.

Response: The available data do not allow NMFS to characterize definitively the risk (or risk reduction) associated with individual fisheries, particularly smaller fisheries such as hagfish for which permit data are lacking. New fisheries are being added in to address their contribution to entanglement risk, and because of the similarity between their gear and the gear of currently regulated fisheries.

Comment 242: Some commenters believed that traps for black sea bass and snapper in the Mid-Atlantic region should be exempt from the regulations since these traps are usually hauled to port every night and therefore cause a minimal risk of whale entanglement.

Response: NMFS recognizes that any line in the ocean poses some risk of entanglement and believes that this final rule has an appropriate combination of conservation measures to minimize entanglements resulting in serious injury or mortality to large whales.

Comment 243: When implementing this final rule, one commenter asked NMFS to consider local New Jersey fishing practices and regional fishery conditions. For example, the commenter stated that many vessels are from the same port, there are no more than 30 vessels, and all vessels fish in close proximity to each other. The commenter also stated that there is significant communication among vessel operators if whales are present.

Response: NMFS recognizes that there are regional issues that influence fishing techniques. This final rule represents a broad-based management scheme; however, regional differences were considered when developing the final rule in consultation with the ALWTRT, which has members from Regional FMCs, coastal state fisheries that interact with large whale species or stocks protected under the ALWTRP, interstate fisheries commissions, academic and scientific organizations, environmental groups, and other interested stakeholders. NMFS believes that the final rule has an appropriate suite of conservation measures to minimize entanglements resulting in serious injury and mortality to large whales. NMFS will continue to discuss regional differences with the ALWTRT when considering future management measures.

Comment 244: One commenter stated that there are only two full time pot fishermen in Virginia Beach and two in Chincoteague. Unless there is a problem in the area, the fishermen should not be economically impacted, especially since the commenter states there are no whales in the area. Until there is more data showing that the mid-Atlantic is an important area for whales, regulations should not change.

Response: The ALWTRP was developed to reduce the level of serious injury and mortality of North Atlantic right, humpback, and fin whales. NMFS data indicate that there have been multiple sightings of right whales in the nearshore area of the Delmarva Peninsula (mostly between March-May), and humpback and fin whales are also present in the area seasonally. Thus, NMFS believes that action is appropriate in this area. Fixed gear fisheries have been documented to entangle large whales and the location where the gear was deployed is not always known. Based on NMFS gear analysis reports, between 1997 and 2003 there were 36 confirmed entanglements between large whales and pot fishery gear. Also see response to Comment 243 regarding regional differences.

Comment 245: Numerous commenters objected to the proposed gillnet regulations for North Carolina fisheries. A few commenters stated that the fishery in North Carolina is different than that farther north. One commenter stated that a 22-lb (10.0-kg) Danforth anchor is not needed in North Carolina, as no whales have been sighted close to the beach. Another

commenter stated that the 22-lb (10.0-kg) anchors should not be required inside 3 nautical miles (5.6 km). Instead of the proposed regulations, several commenters recommend that North Carolina fisheries that target spot in the fall and sea mullet and weakfish in the spring and operate out to 300 yards (274.3 m or 900 ft) be allowed to use dead weights on the inshore end and anchors less than 22-lb (10.0-kg) Danforths on the offshore end, and allow 600-lb (272.2-kg) weak links. Commenters state that these changes are necessary for the following reasons: (1) the nets are short (150-200 yards (137.2 m-182.9 m or 450 ft-600 ft)) with small webbing (<3 in. (0.1 m) stretched); (2) the nets are fished close to the beach using boats 16-25 ft (4.9-7.6 m); (3) the nets are set late in evening and fished in early morning; and (4) there are safety issues with requiring any type of anchor on the inshore end.

Response: NMFS agrees that an additional anchoring and weak link option is appropriate for vessels operating within 300 yards (274.3 m or 900 ft) of the beach in North Carolina. The Mid/South Atlantic ALWTRT Subgroup agreed by consensus to an optional configuration for these fisheries. The gear requirements for gillnet gear set within 300 yards (274.3 m or 900 ft) of the coast in North Carolina will have an optional configuration: five or more weak links per net panel, depending on panel length, with a breaking strength no greater than 600 lbs (272.2 kg), to be anchored with the holding power of at least an 8-lb (3.6-kg) Danforth-style anchor on the offshore end of the string and a 31-lb (14.1-kg) dead weight on the inshore end of the net string.

NMFS believes that the gear modifications required under the ALWTRP do not present significant additional dangers above those of normal fishing practices. However, NMFS will continue to monitor this situation through discussions with industry and the ALWTRT.

NMFS disagrees with the comment that there have been no whales seen close to the beach in North Carolina. Sightings data in the NARW Sightings Database show that there have been numerous right whale sightings throughout the Mid-Atlantic within 1 nautical mile (1.9 km) of the beach. Further, of 413 Mid-Atlantic right whale sightings in the NARW Sightings Database, over 200 were within 5 nautical miles (9.3 km) of the beach.

Comment 246: Many commenters expressed a concern for safety with the proposed gillnet regulations in North Carolina. Several commenters stated that the regulations would have the potential for loss of life and gear. One commenter stated that dead weights are needed in case there is increased wind or rough surf, so the net can be pulled into safer waters for retrieval (tough to retrieve an anchor in these conditions). Fishermen are typically within 200 yards (182.9 m or 600 ft) of the surf zone. The commenter stated that, if the proposed requirement is implemented, fishermen may stop fishing, leave their nets in the water until surf conditions subside, and risk losing gear and/or catch. One commenter states fishermen may also be forced to ignore the safety hazards and retrieve the anchor from rough water. A few commenters state that the 22-lb (10.0-kg) Danforth anchor on the inshore end is a safety risk because it is impossible to remove in the surf zone. However, they state that a 22-lb (10.0-kg) Danforth anchor can be used offshore at 200 yards (182.9 m or 600 ft).

Response: See Response to Comment 245.

Comment 247: One commenter believes that the 22-lb (10.0-kg) Danforth anchor

requirement is a problem on the inshore end of the string for North Carolina and Virginia, where fishing occurs for sea mullet and pan trout in the spring. However, the commenter states that a dead weight would be okay to use.

Response: See Response to Comment 245. This final rule does not contain an optional anchoring configuration within 300 yards (274.3 m or 900 ft) of the beach in Virginia. However, NMFS will discuss whether this option should be extended to other areas with the ALWTRT at the next meeting.

Comment 248: One commenter stated that a 13-lb (5.9-kg) Danforth anchor is used with a 3-foot (0.9-m) chain or 25-lb (11.3-kg) Navy anchor on the offshore end and 40-lb (18.1-kg) lead weights on the inshore end. The commenter further stated that the net can get dragged offshore if conditions are bad. The commenter would be willing to use a 22-lb (10.0-kg) Danforth anchor on the offshore end along with weak links to make his gear whale-safe.

Response: See Responses to Comments 245 and 247.

Comment 249: One commenter believes that the 22-lb (10.0-kg) Danforth anchor provision is a problem both inshore and offshore. According to the commenter, especially in September, fishermen fish close to the beach and haul from the bow, and pulling that anchor could cause the boat to capsize in small waves. The commenter recommends using a dead weight inshore and an 8-lb (3.6-kg) Danforth anchor offshore.

Response: See Response to Comment 245.

Comment 250: One commenter suggested that NMFS not change the seasonal window from December - March 31 to September 1 - May 31. If NMFS changes the time period, the commenter requested that the inshore small mesh fishery (<5 in. (0.1 m), 300 yd. (274.3 m or 900 ft) max. set) use a dead weight inshore and an 8-lb (3.6-kg) Danforth anchor offshore end and 600-lb (272.2-kg) weak links rather than 1,100 lb (499 kg) weak links.

Response: NMFS has analyzed the NARW Sightings Database through early 2003, supplemented by additional data on humpback and fin whale sightings, including both opportunistic and systematic survey data. The associated time frames of conservation measures included in this final rule are times where documented large whale sightings primarly occur. Thus, NMFS believes the September 1-March 31 window is appropriate for the Mid-Atlantic.

With respect to the use of various anchoring systems, please see Responses to Comments 245 and 247.

Comment 251: One commenter has a problem fishing anytime or anywhere using a 22-lb (10.0-kg) anchor. The commenter states that smaller boats do not have enough room for the anchors and it is unsafe to have them. The commenter supports using a 13-lb (5.9-kg) anchor instead.

Response: NMFS agrees and has changed the anchoring requirements for smaller vessels operating within 300 yards (900 ft or 274.3 m) of the shoreline in North Carolina (see "Changes from the Proposed Rule" section of the preamble). See responses to Comments 245 and 247.

Comment 252: One commenter states that the proposed regulatory actions, if not modified, would be inconsistent with enforceable North Carolina Administrative Code 15 A NCAC 07H.0207 and will have an effect on Public Trust Areas and Estuarine Waters. The commenter states that, if the proposed measures are not modified, they would adversely affect the public's ability to conduct recreational and/or commercial fishing. The commenter supports DEIS Alternative 3 conditioned on modifications (below), concurrent with North Carolina's CZMA program. North Carolina proposes that the fishing season and time period required for the Mid/South Atlantic region remain unchanged. If the time period is changed, the state believes that an alternative configuration be considered as the expansion of the gear restricted period and the requirement for fishermen to use Danforth-style anchors during this period may create safety hazards for coastal fishermen setting nets in the coastal zone during the early fall/late spring. The State also requests that NMFS reconsider the mandatory use of sinking and/or neutrally buoyant line (and/or offer low cost alternatives) and extend the effective date to January 1, 2010, to reduce potential economic hardship and increase the time available to replace current gear. Finally, the State does not support the alternative marking system for fishermen who use gear in both Mid-Atlantic and Northeast waters, believing that this system would cause a financial burden on fishermen as they would have to buy another set of buoy lines for this gear. The State instead proposes a unique, individual marking system like the one currently being evaluated by Dr. Harper with the Virginia Sea Grant Marine Advisory Program. If these conditions are not met, then the State would object to the proposed rule.

Response: NMFS based the components of the final rule on numerous discussions with the ALWTRT. NMFS believes that the final rule has an appropriate combination of conservation measures to minimize entanglements resulting in serious injury and mortality to large whales.

Through this action, NMFS will finalize an expanded season in the mid-Atlantic when ALWTRP requirements are effective (see response to Comment 151). Also, see the response to Comment 245 for gear requirements, anchoring options and safety considerations. With respect to the implementation schedule for the groundline requirements, see response to Comment 118.

NMFS reiterates that the gear marking requirements in this final rule only require buoy lines to utilize one 4-inch (10.2- cm) colored mark midway on the buoy line. A possible option for meeting this requirement is weaving the appropriate color marking into the buoy line. NMFS will continue to discuss gear marking strategies with the ALWTRT and support research and development of promising marking technologies.

Comment 253: One commenter said that there is no problem with whale interaction and gillnet gear off the North Carolina coast. Several commenters wanted to know if the 1,100-lb (499.0-kg) weak link has been tested off North Carolina in fisheries where they fish from 5 fathoms (9.1 m or 30 ft) to 70 fathoms (128 m or 420 ft) and questioned what the effects are on the nets. The commenter believes that their fisheries are being grouped with others, when one

size does not fit all.

Response: While it is often difficult to identify the specific gear type involved in an entanglement, NMFS has evidence that fixed gear types, such as gillnets, have entangled large whales. Thus, it is necessary to regulate all fisheries that use this gear to ensure protection of whales. Based on NMFS gear analysis reports from 1997 to 2003, there were 23 confirmed entanglements preliminarily attributed to gillnet gear; these events involved 2 right whales, 18 humpback whales, 2 fin whales, and 1 minke whale. Of those 23, 6 were entanglements involving gillnet gear that were first sighted off the coast of North Carolina.

Testing of weak links has occurred and continues to be conducted by NMFS gear specialists and NMFS believes that weak links are a valuable tool to minimize risk to large whales.

Comment 254: One commenter provided NMFS with a description of the North Carolina black sea bass fishery. Specifically, North Carolina fishers use smaller pots than those from Virginia northward; approximately half of the NC fishers use groundline and fish overnight sets; the rest use singles, fewer pots, and do not leave them in the water overnight. Further, depending on the number of pots, fishers will fish up to 3 times a day, usually using short groundlines (<30 ft (9.1 m)). The commenter suggested that NMFS consider requiring North Carolina black sea bass fishermen to use lower profile lines, which could be created at relatively low cost by weaving lead into poly lines, and would keep lines approximately 2 ft (0.6 m) off the bottom.

Response: The gear requirements in this final rule state that Mid-Atlantic pot fishery gear, including black sea bass gear is regulated similar to lobster trap gear, and is subject to sinking and/or neutrally buoyant groundline requirements 12 months after publication of this final rule. See the response to Comment 158 with regard to low profile line, and the response to Comments 243 and 255 with regard to regional issues.

Comment 255: One commenter was concerned about sinking line between pots. The commenter said that the bass pot fishery in the Mid-Atlantic and the lobster pot fishery in the northeast (pots 100 feet (30.5 m) apart) are very different. The commenter said that, down south, they fish on bottom structures with pots 10-12 feet (3.0-3.7 m) apart with 8 pots per buoy.

Response: See response to Comment 243 regarding regional issues. Floating line between traps has been implicated in large whale entanglements; NMFS has evidence that establishes the risk associated with this gear configuration. Underwater video footage of typical lobster gear with floating groundline shows that it forms large loops in the water column between traps. Similar underwater video footage of neutrally buoyant line between traps indicated that it did not have the same vertical profile as floating line; rather, it was located on or near the bottom, thus reducing the risk of entangling a large whale. Therefore, NMFS expects that by eliminating most floating line and requiring sinking and/or neutrally buoyant groundline

in the pot fisheries will remove a large percentage of the line in the water column.

Comment 256: A few commenters agreed that the red crab fishery should be exempt from regulations at depths greater than 280 fathoms (512.1 m or 1,680 ft).

Response: NMFS appreciates the comment and the support for the final rule.

Comment 257: Several commenters raised a habitat issue with using sinking/neutrally buoyant groundline. Specifically, the commenters stated that, in the snapper/grouper fishery, there are regulations prohibiting roller-rig trawls and traps for any species other than black sea bass to reduce habitat impacts. Additionally, there are closed areas to protect *Oculina* coral.

Response: See Response to Comment 128.

Comment 258: One commenter stated that the hagfish fishery is much smaller than the lobster fishery and therefore poses less risk than lobster gear.

Response: NMFS acknowledges that the hagfish fishery currently represents a small percentage of fixed gear compared to the lobster fishery. Although the hagfish fishery is a relatively smaller fishery, its gear has been documented to have entangled large whales.

Comment 259: One commenter stated that when the Great South Channel is closed from April 1 – June 30, fishers move around to areas closed to draggers, which means they go to the Georges Bank Closure in May and then Closed Area 1 in June. The commenter further states that hagfish are abundant during these times in these areas, possibly the most productive months of the year. The commenter believes that closing this area at these times would have devastating effects on this fishery.

Response: NMFS acknowledges and appreciates the concerns raised by the commenter. NMFS will treat other pot fisheries similar to the lobster fishery in this final rule, so the hagfish fishery will be subject to regulations to reduce the risk to endangered and threatened large whale stocks.

Comment 260: One commenter states that, by adding the hagfish fishery to the group of fisheries subject to the ALWTRP, it would be regulated like the lobster fishery. The commenter states there are differences that should be considered, such as weight of the traps (300-500 lbs. (136.1-226.8 kg) when full), frequency of hauling the gear (every 12-18 hours), consideration of historically fished areas (like Great South Channel critical habitat), and the size of the hagfish fishery (smaller than the lobster fishery).

Response: NMFS believes it is appropriate to regulate the hagfish fishery similar to the lobster trap/pot fishery under the ALWTRP. This includes similar weak link requirements, as well as time-area restrictions (e.g., Great South Channel). NMFS believes the differences between the hagfish and lobster trap/pot fishery stated by the commenter would not justify

having the hagfish fishery being treated differently.

Comment 261: One commenter requested NMFS limit entry into the shark gillnet fishery to vessels with landing history using both sink gillnet and driftnets. The commenter suggested that NMFS should distinguish between driftnets, strike nets, and small mesh sink nets. In addition, the commenter asked NMFS to define the relationship of sink gillnets with anchors on ends and shallow meshes to drifting deep gillnets.

Response: Limiting the number of fishermen in a fishery, if resulting in reduced fishing effort, may provide conservation benefits to large whales. However, such a management measure is beyond the scope of this ALWTRP final rule. NMFS may consider such action in future rulemaking regarding authorized gears and permit reform for Highly Migratory Species (HMS) fisheries. The current definitions in 50 CFR 229.2 explain the difference between anchored (e.g., sink gillnet) and driftnet gear.

Comment 262: Several shark fishermen in the Southeast said they lost 3 fishing days due to right whales being in the area and fishermen moving their gear. The commenter wanted this to be acknowledged by NMFS.

Response: NMFS appreciates the efforts of these fishermen and their participation in helping to conserve highly endangered right whales. See response to Comment 274.

1.1.17 Comments on Enforcement

Comment 263: Several commenters stress the need for strong enforcement and believe there is no mechanism or system (e.g., enforcement strategy) or timeframe for handling violations or monitoring compliance in the proposed rule. One commenter states that the existing regulations are under-enforced, and that adequate enforcement of existing regulations would protect whales sufficiently.

Response: Enforcement of the ALWTRP regulations is essential to their success. Current regulations are being enforced and increased enforcement would likely lead to increased compliance. The mechanism for enforcement is through a partnership between NMFS Office of Law Enforcement (OLE), the USCG, and state enforcement entities. Monitoring compliance levels at sea is challenging because of the complexity and geographic expanse of the fishing activity subject to the ALWRTP. NMFS' strategy is to partner with state entities as many states have personnel and vessel resources available for marine resources compliance monitoring. These partnerships have yielded some excellent results. For example, a short duration random survey of lobster gear was conducted by the Maine Marine Patrol along the coast of Maine in 2004. This 30 day survey demonstrated a 98-percent compliance rate with ALWTRP requirements.

Comment 264: Commenters stated that NMFS needs some kind of enforcement where either states or the federal government is able to lift these nets and make sure they are in

compliance, because every time NMFS writes a rule, the commenter believes that the honest fishermen are being punished.

Response: NMFS is aware of the desire to haul gear to monitor compliance with ALWTRP requirements. Federal funds have been made available to state enforcement entities. Some of these funds have been utilized to purchase or lease/rent vessels capable of hauling trap/pot gear. Law enforcement also can board a vessel and observe as the operator retrieves gear to monitor compliance with gear requirements. NMFS seeks to identify non-compliant fishermen in its enforcement efforts.

Comment 265: One commenter suggested developing an enforcement plan that outlines agencies with authority, the role of each agency with authority, and a letter of agreement among authorities for timely and efficient enforcement.

Response: The authority and the role of individual agencies with respect to species covered by the ALWTRP is determined directly by the ESA and the MMPA. The USCG provides the resources, personnel, and expertise for enforcement at sea while NMFS provides case development and prosecution. Coastal states have assumed an increased role in enforcement at sea.

Comment 266: One commenter requested that NMFS mandate new reporting programs where fishermen report in real-time where they are placing fishing gear and where the gear is being lost.

Response: NMFS is concerned about lost gear and collects data on losses. For example, in the Federal lobster fishery, data are collected about losses that exceed the allocated gear loss allowance. The fishing gear types that the ALWTRP regulates are predominantly lobster trap and multi species sink gillnet. Federal lobster and gillnet fishery reporting requirements collect some location information through vessel trip reports. State lobster fishery management plans monitor effort by distinct fishing areas under an interstate fishery management plan. Neither of these processes is real time as suggested by the commenter.

As of November 22, 2006, all limited access Northeast multi-species vessels (which would include sink gillnet activities) are required to use real time reporting of vessel location through the vessel monitoring system (VMS). VMS is being considered for the entire groundfish fleet, which would include sink gillnet activities, under Framework 42. VMS is also utilized in the shark gillnet fishery. Presently, there is no VMS requirement for lobster trap/pot gear.

The requirements to tag lobster traps and some gillnet fishing activities allows NMFS to identify individual traps and some net panels by discreet identification numbers.

Comment 267: One commenter acknowledged and encouraged NMFS' plans to convene an ALWTRT Subgroup on monitoring.

Response: A Status Report Review Subcommittee, which will address monitoring, has

been established as an outcome of the April 2005 ALWTRT Meeting.

Comment 268: One commenter stated a perceived lack of enforcement in the Gulf of Maine, which was brought up at the last NEFMC meeting. The commenter stated that the NEFMC was briefed on NMFS' enforcement efforts and cooperation with the states.

Response: NMFS has increased enforcement of ALWTRP regulations in the Gulf of Maine, George's Bank, and Southern New England. This has been done through USCG efforts and through state-Federal partnerships over the past 3 years. The states of Maine, Massachusetts, and Rhode Island have received funds to conduct at sea enforcement of ALWTRP regulations.

Comment 269: One commenter stated that NMFS should address the fact that the State of Maine has apparently not mandated compliance with the protocols used under the Atlantic Large Whale Disentanglement Network.

Response: The State of Maine has developed a conservation program that assumes a larger role, relative to many states along the eastern seaboard, in the disentanglement of large whales. NMFS has worked closely with the state on the development and evolution of the conservation plan and believes Maine is operating in accordance with the protocols.

Comment 270: One commenter believed year-round requirements in the EEZ would facilitate enforcement, whereas a three month exemption in the Mid-Atlantic (as in Alternative 3) would be problematic for enforcement.

Response: The enforcement community has experience with a large number and variety of time-area closures and gear restricted areas in the Mid-Atlantic as well as the Northeast. NMFS believes the 3-month period in question, versus year round requirements, may not be optimum in terms of enforcement but has been selected to reduce regulatory impacts on the fishing industry during periods when whales are infrequently sighted in that area.

Comment 271: One commenter said that the Commonwealth of Massachusetts will prosecute fishermen if rope is found on a whale.

Response: The Commonwealth of Massachusetts has a long history with whales and disentanglement given the unique characteristics of Cape Cod Bay and Massachusetts state waters. The primary focus of removing rope from entangled whales is to reduce the likelihood of serious injury or mortality. The secondary focus of removing ropes from whales is to learn more about how whales become entangled. This information may aid in the design of gear which can reduce the likelihood of future serious injury or mortality. Fishermen are an important resource in the study and development of gear modifications. NMFS is not aware that any fisherman has been prosecuted for the entanglement of a whale by the Commonwealth of Massachusetts.

Comment 272: Two commenters stated that enforcement will be difficult between commercial and recreational fishermen and an exemption line may increase resentment and non-compliance. One comment stated that it will be hard to distinguish between commercial and recreational gear at sea.

Response: The ALWTRP does not regulate recreational fishermen. Some states, such as the Commonwealth of Massachusetts, have regulations for the protection of right whales that apply to some of the recreational and commercial fisheries under their jurisdiction. Massachusetts prohibits recreational lobster traps in Cape Cod Bay during certain times of the year and differentiates commercial from recreational gear through a gear marking scheme. See response to Comment 237 for information on the management for marine mammal interactions with recreational fisheries.

Comment 273: One commenter expressed concern with the difficulty of enforcing weak link breaking strengths and 30-day soak time limits.

Response: NMFS recognized the difficulty in determining breaking strengths of different types of weak links when the plan was first developed. Industry outreach has been conducted demonstrating a variety of weak link types and their associated breaking strengths. Training on ALWTRP gear requirements is provided to the USCG Fisheries Training Centers and state enforcement entities. Several manufacturers have developed commercially available weak links of various breaking strengths which can be purchased at fishing supply stores. These weak links typically have the breaking strength shown in raised letters on the actual weak links. NMFS also has fishing industry outreach specialists. These individuals have experience with fishing gear and are available to evaluate weak links for the fishing industry and law enforcement agencies. Thirty-day soak limits have been enforced. Enforcement actions based on the 30- day soak time limit were taken in 10 cases in 2005.

Comment 274: One commenter states that there was an issue in the southeast regulations with shark net gear that say the gear has to be removed if right whales, humpbacks or finbacks are located within 3 nautical miles (5.6 km). However, it is not clear to the commenter how that would be accomplished or who would identify the whales being within 3 nautical miles (5.6 km) of the gear.

Response: NMFS, consistent with recommendations from the ALWTRT, believes fishermen are motivated to avoid potential gear conflicts with whales. However, other measures are in place to aid fishermen in preventing potential whale/gear interactions. In the Southeast, an Early Warning System (EWS) is maintained by the Southeast U.S. Right Whale Recovery Plan Implementation Team (SEIT) and its partners. Near real-time data, including the number of whales, location (latitude and longitude) of whales, and direction of their travel, are transmitted to numerous interested stakeholders such as shipping agents and commercial mariners, including fishermen, via pagers and email notifications. Information is also received by operation dispatchers, who then relay the details to their vessels. General locations for animals are also broadcast over Marine VHF. NMFS believes that these measures relay critical whale

information to fishermen, but will continue to work with the SEIT and its partners, as well as fishermen, to facilitate and improve the distribution of sightings information.

Comment 275: One commenter states that VMS is not 100-percent reliable, there are battery failures and mechanical failures. This commenter also believes that it costs a lot of money for nothing and that some fishermen have VMS that may not need them.

Response: NMFS believes VMS is appropriate to substitute for 100-percent observer coverage in the Southeast U.S. Monitoring Area as defined in this final rule. The system offers NMFS the ability to monitor vessel timing and location across management boundaries, enables effective, coordinated dockside or at-sea inspections, and facilitates coordination with other enforcement agencies. Although self-installation of VMS units has been permitted, subsequent problems have been noted (e.g., insufficient power supply and improper wiring). NMFS encourages fishermen to have units installed by the professionals. Power must be consistent to allow each unit to report properly, and NMFS suggests that fishermen maintain a backup battery for this reason. Once battery power has been drained, the unit will not send reports and significant damage to it may occur. NMFS law enforcement and approved vendors are improving unit models and pursuing alternatives to detect battery power and stop reporting/power usage until the unit is fully powered again. If units do malfunction, individuals should coordinate with Southeast Enforcement VMS personnel. Otherwise, fishermen are encouraged to have a vendor or electrician tend to the unit; vessel operators are advised to not leave port until the unit is repaired, in accordance with regulations.

Comment 276: One commenter said that several people in New Jersey and other places would never run a shark gillnet south of Jacksonville, but will be required to use mandatory VMS and was wondering if that was intent of the rule and asked whether NMFS was considering the issue again and considering a change.

Response: Although monitoring shark fishermen off New Jersey and surrounding areas was not the intent of the VMS requirement, in the regulations for Highly Migratory Species (HMS), these data will allow NMFS to obtain a better understanding of the shark fishery in this area, including if fishermen move farther south into the Southeast U.S. Monitoring Area. See Comment 275.

Comment 277: Several commenters said that although there are some operational issues to consider regarding VMS, some commenters preferred this over the observer requirement in the Southeast.

Response: NMFS agrees that VMS is appropriate for the Southeast U.S. Monitoring Area as defined in this final rule, and will work with fishermen to overcome operational issues. See Comment 275.

Comment 278: Several commenters stated that the Observer Program (i.e., a fishery

monitoring program where an observer goes to sea with the fisherman) and VMS (i.e., an electronic vessel tracking system) are duplicative. These commenters agreed that the VMS device is expensive as well as difficult to install, activate, and maintain. One commenter suggested that, in light of the problems associated with the VMS, fishermen should not be liable if the VMS device does not indicate whether it is functioning properly.

Response: NMFS disagrees that VMS and observer coverage are duplicative, as each program serves a different purpose. The Observer Program is intended and designed to collect fisheries-dependent physical, biological, and economic data, which can then be used in stock assessments and also verify logbooks; the program is not meant for compliance monitoring. In contrast, VMS' primary purpose is the monitoring and enforcement of time-area closure restrictions, as well as gear compliance.

NMFS believes it is the responsibility of fishermen to make sure that their VMS units are functioning properly. If units malfunction, individuals should coordinate with Southeast Enforcement VMS personnel or contact a vendor or electrician to tend to the unit; vessel operators are advised to not leave port until the unit is functioning properly. See Comment 275.

1.1.18 Comments on the Shipping Industry and/or Ship Strikes

Comment 279: Numerous commenters stated that NMFS needs to address the shipping industry (e.g, tankers, freighters, large ships, and ocean liners) and the Navy, as ship strikes are the leading cause of serious injury and death to large whales (as opposed to just regulating commercial fishermen). One commenter requested that NMFS address shipping and cruise industry ship strikes before prohibiting floating groundline.

Response: NMFS acknowledges and appreciates the commercial fishing industry's involvement in the ALWTRT and the modifications already made to reduce the risk of serious injury and mortality of large whales. NMFS agrees that ship strikes and the need to mitigate the risks posed by vessel traffic is also important to large whale conservation and recovery. As such, NMFS is simultaneously pursuing other rulemaking strategies and policy discussions to address the threat of ship strike. The Northeast and Southeast Implementation Teams (NEIT/SEIT) for the recovery of the North Atlantic right whale include representatives from various Federal agencies such as the Navy and the USCG, state agencies, port authorities, and the shipping industry. Based on information and recommendations provided by these groups, NMFS developed and published a proposed rule for right whale ship strike reduction in the *Federal Register* (71 FR 36299, June 26, 2006). The proposed rule presents regulatory measures that NMFS is considering to reduce the risk of ship strike to right whales, such as speed restrictions and vessel routing measures.

The proposed rule is one component of a suite of NMFS' comprehensive right whale ship strike reduction measures, which also includes education and outreach to commercial and recreational mariners, research on technologies that may help mariners avoid whales, a comprehensive program of sighting advisories to mariners, section 7 consultations to address Federal vessel activities, and the development of a Conservation Agreement with Canada.

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. Both the US Navy and the USCG have undergone ESA section 7 consultations on various activities that may affect large whales. In addition, the U.S. Navy and USCG implement internal policies regarding marine mammals, including marine mammal observer training, restrictions on activities in protected areas and important habitats, reporting of any dead or injured whales sighted and mandatory reporting of any interactions with marine species.

NMFS recognizes both entanglement and ship strike as human-caused sources of serious injury and mortality to large whales that need to be addressed in order to recover these species. Floating groundline has been identified as an entanglement risk to whales, and is therefore being addressed in this final action.

Comment 280: Many commenters said that more should be done to reduce the mortality of whales due to commercial and military ship strikes. Commenters stated that NMFS has not found a solution to ship strikes or entanglements and little has been done. Other commenters believed that, though commercial and naval ships pose the greatest threat to whales' existence, these ships continue to operate largely unregulated. Several commenters believed that ship strikes occur more often than previously thought.

Response: NMFS agrees that ship strikes are a source of mortality to large whales that needs to be addressed in order to recover these species. See response to Comment 279. NMFS acknowledges that historic reports of ship strikes may not accurately represent the frequency of ship strikes due to the lack of a central reporting mechanism. Although current reporting practices and improved knowledge about the types of wounds inflicted by ship strikes have improved understanding of ship strikes, many ship strikes are still likely to go undetected or unreported.

Comment 281: One commenter states that more whales are hurt by ships outside three miles (5.6 km) than by rope and buoys used in fishing operations.

Response: Because many ship strike and entanglement events are unobserved at the time the incident actually occurred, it is difficult to determine where whales are struck or become entangled. In addition, many entanglement and ship strike events likely go undetected. As such, it is difficult to draw conclusions about where these events occur and whether ship strike or entanglement poses a greater threat to large whale populations. NMFS recognizes both entanglement and ship strikes as human-caused sources of serious injury and mortality to large whales that need to be addressed in order to recover these species, and is undertaking regulatory efforts to address both issues. See Response to Comment 279.

Comment 282: Two commenters stated that the LNG Terminal, which is located in the summer feeding ground, will result in vessels going through the feeding grounds, which is more dangerous than entanglement risk. One of these commenters believes that it is wrong to put a proposed LNG terminal into the Critical Habitat Area. The commenter states that the big

propellers on the patrol boats are more apt to kill a whale then some fishing gear.

Response: While NMFS appreciates the concern raised, the current action addresses the effects of entanglement in commercial fishing gear on large whales. The effects of other marine resource uses, such as commercial shipping and offshore LNG terminals, are being addressed through other regulatory and management processes. LNG terminals are licensed by other Federal agencies, which are subject to the requirements of section 7 consultation under the ESA. See Response to Comment 279.

Comment 283: Another commenter mentioned that whales are beyond Schoodic Ridge, west of Blue Nose Buoy, and in deep water. The commenter has seen large vessels including a high speed ferry traveling at 50 knots (92.6 km) through feeding whales. The commenter believes that there should be regulations on ships, and does not understand why lobstermen are singled out.

Response: NMFS agrees that ship strikes and the need to mitigate risks posed by large, fast-moving vessels are important to large whale conservation and recovery. As such, NMFS is pursuing other rulemaking strategies and policy discussions to address the issue of ship strikes. See Response to Comment 279.

Comment 284: Some commenters stated that NMFS should address all sources of endangered whale mortality. Many commenters were concerned about the level of regulation on the fishing industry relative to other causes of mortality like shipping and land based activities (e.g., water quality issues). One commenter pointed to those which endanger whales by disposing of waste at sea as another example of an unregulated group that is not reached by today's regulations. Some commenters stated that all industries should share the regulatory burden, yet some are unregulated (e.g., shipping and Canadian fishing gear). Other commenters stated that NMFS should seek a comprehensive whale protection strategy that takes other impacts into account nationally and internationally to share the responsibility of conservation efforts.

Response: NMFS realizes that other marine resource user groups are affecting large whale populations, and NMFS will continue efforts to reduce these impacts. NMFS is pursuing various regulatory and non-regulatory strategies for reducing the impact of vessel collisions on northern right whales. See response to Comment 279. Many ocean disposal and discharge activities require permits issued by other Federal agencies such as the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers. Under section 7 of the ESA, any Federal agency issuing such a permit must consult with NMFS (or U.S. Fish and Wildlife Service) to ensure that the issuance of the permit is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. Section 7 consultations often result in restrictions and mitigation measures that are required of the permit applicant in order to reduce impacts to endangered species.

NMFS also continues to participate in international fora that address impacts to large whales. NMFS is continuing to work with Canadian biologists and to support efforts to expand

disentanglement efforts in Canadian waters. NMFS will continue to work with the government of Canada toward development of similar protective measures from fishing operations for right whales in Canadian waters. NMFS has also initiated discussions regarding an International Conservation Agreement for right whales with Canada, which would include the impacts of shipping on right whales. The Conservation Committee of the International Whaling Commission (IWC) identified ship strike as a priority item in the conservation agenda, and recently formed a ship strikes working group to assess the level of threat caused by maritime traffic worldwide and to examine policies that could be implemented to mitigate the impact of ship strikes. The International Maritime Organization (IMO) has reviewed and approved proposals to address the impacts of shipping on marine mammals, including approval of the right whale Mandatory Ship Reporting System in 1998 and the shifting of the Bay of Fundy shipping lanes in Canada in 2003. In December 2006, the IMO approved a proposal to shift the Boston Traffic Separation Scheme to reduce the overlap between heavy shipping traffic and large whales.

International organizations such as the IWC and the International Council on the Exploration of the Sea (ICES) are examining the effects of ocean noise on marine mammals, including the noise generated by shipping, oil drilling, and seismic exploration. NMFS convened the first international symposium on shipping noise and marine mammals in 2003. All of these groups are considering strategies for managing human-produced noise sources in the marine environment.

Many of NMFS' activities to promote the conservation and recovery of large whales are directed by actions outlined in recovery plans developed in accordance with the ESA. Recovery plans are designed to provide comprehensive strategies for recovering endangered species.

Comment 285: Several commenters believe that the negative impacts of the whale watch industry need to be assessed. One commenter said that there is a problem with whale watching vessels getting too close to whales.

Response: NMFS monitors the activities of the whale watch industry. NMFS has developed a set of whale watching guidelines for the Northeast, which outline appropriate speed limits and approach distances to reduce the potential for harassment of whales. NMFS also has a regulation prohibiting approaching closer than 500 yards (1,500 ft, 457.2m) to a right whale. NMFS conducts active outreach to whale watch companies to encourage compliance with these guidelines. NMFS is also working on a proposed rule to minimize the potential for future serious injury and mortality of whales from whale watch vessels.

Comment 286: One commenter asked why NMFS is not attacking the real problem, which the commenter said is cruise ships, ferries, tankers, and whale watchers. The commenter said some vessels leave Bar Harbor going 35 miles an hour (56.3 km/h), and he hears on the radio about the whales they are seeing. The commenter said that these vessels could be chasing whales into fishing gear.

Response: NMFS is currently pursuing a comprehensive strategy of regulatory and non-regulatory measures to reduce the impact of shipping on right whales. See response to Comment

279. Although it is possible that a whale could become entangled in fishing gear while attempting to escape an oncoming vessel, NMFS is not aware of such an event being documented. Researchers continue to investigate the circumstances under which whale/gear and whale/vessel interactions occur.

1.1.19 Comments on Gear Reduction

Comment 287: Two commenters referenced LMA 3 as an area where there was a reduction in lobster traps being fished. One commenter urged NMFS to consider the recent LMA 3 offshore historical qualification process that reduced the number of offshore permits from 968 to 133 and the number of traps from approximately 400,000 to 160,000. The other commenter stated that in LMA 3 there has been a 40-percent reduction in traps fished. The commenter stated that trap reduction is the most valuable way to stop interaction with whales. Another commenter stated that reducing the number of traps in an area, such as in LMA 3 will be better than gear modifications and it will better help protect whales. The Federal lobster management plan identifies and restricts the number of fishermen able to fish offshore, and this smaller number of fishermen will reduce their traps, buoylines, and loops. The commenter estimated a nearly 50 percent reduction over the next five to seven years. One commenter states that the overall amount of gear and fishing effort will be reduced over the next couple of years. The commenter states the number of lobstermen is declining from 3,000 to less than 150 and the amount of gear in the water will decline by more than 40 percent.

Response: NMFS acknowledges the effort reductions that are occurring in LMA 3, and agrees that this should help reduce serious injury and mortality of large whales. NMFS believes these effort reductions will be critical to future discussions with the ALWTRT on how to reduce risk associated with vertical line. However, NMFS believes reducing risk associated with groundline through this final rule is appropriate even with the effort reductions occurring offshore. Additionally, with this final rule, NMFS intends to address all fishing gear that poses a risk to large whales similarly.

Comment 288: One commenter states that the figures in the DEIS do not reflect an additional two year lobster gear reduction along with continual passive reductions through a proposed trap transferability plan recommended to the ASMFC. The commenter would like to see a trap buyback to further reduce the number of traps to help whales and the lobster fishery.

Response: The commenter is likely referring to Addenda IV and V to the Lobster FMP. As discussed in Chapter 9 of the FEIS, Addendum IV as initially proposed incorporated an accelerated trap reduction program and the implementation of a transferable trap program in LMA 3 (among other provisions). ASFMC deferred action on this proposal, opting instead to address this issue under Addendum V. The approach originally outlined in Addendum IV proposed an overall trap cap of 2,600 traps and a two-tiered tax on the purchase of traps, with a higher tax applied when the purchaser owns 2,100 traps or more. In response to concerns raised

at public hearings that a 2,600 trap cap may be too high, the LMA 3 Lobster Conservation Management Team (LCMT) amended its original proposal under Draft Addendum V. Addendum V proposed a cap of 2,200 traps and a two-tiered tax on the purchase of traps, with a higher tax imposed when the purchaser owns 1,800 or more. Addendum V was approved by the Board at the March 2004 Board meeting and went into effect in 2005.

NMFS and others have supported buybacks of groundline. See response to Comment 93. Limiting the number of traps in a fishery, if resulting in reduced fishing effort, may provide conservation benefits to large whales. However, this management measure is beyond the scope of this final rule. NMFS is pursuing measures such as trap effort reduction through other rulemaking actions (e.g., 70 FR 24495, May 10, 2005).

1.1.20 Comments Regarding Canadian Gear/Fisheries

Comment 289: Several commenters said that Maine fishermen mark balloons with fishermen's name, harbor name, and boat name. Commenters stated that most balloons picked up that are not marked come from Canada. Another commenter said that he fears being evicted from the lobster grey area because Canadian and U.S. gear is being fished side by side and one would not be able to tell whose gear is responsible for potential entanglements.

Response: NMFS disagrees with the commenters' claim that most recovered polyballs or "balloons" that are not marked come from Canada. Further, NMFS notes that it is not revising the ALWTRP based on the recovery of unmarked polyballs or gear that may have originated from the grey area. The need for the revisions of the ALWTRP is the continuing risk of serious injury and mortality of Atlantic large whales due to entanglement in commercial fishing gear. NMFS considered several factors when evaluating the entanglement information: (1) A mortality or injury may involve multiple factors (e.g., whales that have been both struck by a ship and entangled are not uncommon); (2) the actual gear type/source is often uncertain; and (3) several types of gear may be involved in a given reported entanglement. NMFS limits a "serious injury" designation to only those reports that offer substantiated evidence that the injury is likely to lead to the whale's death. Injuries that impede the whale's locomotion or feeding are not considered serious injuries unless they are likely to be fatal in the foreseeable future.

Comment 290: One commenter expressed concern over the lack of Canadian take reduction efforts and gear modification requirements. The commenter expressed concern that all entangled whales get counted against U.S. fishermen.

Response: NMFS is issuing this final rule specifically to address commercial fishery impacts from U.S. fisheries. NMFS acknowledges that entanglements with fishing gear from Canadian fisheries may also cause serious injury and mortality to large whales. NMFS is currently addressing these threats through formal discussions with Canada. For example, NMFS is working with representatives from the Canadian DFO to develop and implement protective measures for right whales in Canadian waters. The ALWTRP is designed to respond to the threats posed by domestic fishing gear.

Comment 291: Several commenters state that NMFS should work more closely with the Canadian Government to harmonize American and Canadian fishery regulations. They state that Canadian fishing gear is a major cause of whale entanglements that lead to injuries and mortalities. Commenters encouraged NMFS to pursue parallel conservation measures with the shipping industry and military vessels in the U.S. as well as Canada. One commenter encouraged NMFS to work with the Canadian Government through the Canadian Species at Risk Act for joint efforts to protect right whales.

Response: Coordination between Canada and the U.S. concerning transboundary marine mammal and other protected species has been ongoing since mid-1990. In earlier years the coordinated efforts focused on broader issues concerning Atlantic salmon, harbor porpoise and right whales. At that time, most of the issues regarding right whales were secondary as both countries addressed other pressing issues. Although both countries continued to work cooperatively on right whale issues, limited resources prevented both countries from meeting on a regular basis. However, in anticipation of the implementation of SARA, the group was reconstituted in January 2003. The focus of the group was still based on species-specific conservation, but the charge for the working group was expanded to include joint assessments, listing criteria, and recovery planning and implementation in a broader sense to include all transboundary marine mammal and protected species stocks (with the exception of Atlantic salmon). The working group's primary efforts are toward right whale recovery efforts. NMFS is continuing to work with the Canadian government to develop and implement protective measures for right whales in Canadian waters. In addition, NMFS is working with Canadian whale biologists and support teams to improve and expand disentanglement efforts in Canadian waters.

1.1.21 Comments on the Number of Traps Per Trawl

Comment 292: One commenter encourages more traps per buoy line whenever possible. For areas in eastern Maine where sinking groundline cannot be used, the commenter thinks reducing line by shifting to longer trawls where possible would be a viable option. The commenter recommends a limit on the number of traps per lobster trawls as an emergency action. Another commenter opposes putting limits on the number of traps per trawl. The commenter states that he cannot fish more than 25 traps per trawl due to boat size.

Response: In this final rule, NMFS is maintaining the status quo for the minimum number of traps/pots with a single buoy line in specific management areas. Additionally, NMFS believes that reducing profile of groundline along the east coast, including eastern Maine, through this action is important to reduce the serious injury and mortality of large whale due to incidental entanglement in commercial fisheries. Options such as this for reducing risk associated with vertical lines will be discussed with the ALWTRT at the next meeting.

Comment 293: One commenter understands that NMFS is not proposing to move nearshore requirements into inshore waters. The commenter states that there should not be restrictions such as "no single traps" or "one buoy line for less than five trawls" in inshore

waters. The commenter does not agree with nearshore regulations being expanded into inshore waters.

Response: As the commenter stated, NMFS is managing inshore and nearshore trap/pot waters differently under the plan. NMFS will be discussing options for addressing risk associated with vertical line with the ALWTRT at the next meeting, and will pass along the commenter's concerns.

1.1.22 Comments on Vessel Anchoring Systems

Comment 294: Many commenters requested that NMFS investigate the degree to which vessel anchoring systems pose a risk to whales. For example, according to the commenter, in 2003, a humpback whale in Stellwagen Bank National Marine Sanctuary was entangled in a small boat anchoring system. Additionally, commenters stated that two humpback whales were disentangled from anchors - one gillnet and one vessel anchoring system. These commenters stated that NMFS does not consider anchoring systems as a risk.

Response: Anchoring systems have been recognized by NMFS as a risk to large whales and have been addressed by requiring sinking line on lines leading from gillnets to the anchor. The anchoring systems of small recreational vessels in pursuit of fin fish in areas like Stellwagen Bank National Marine Sanctuary are not captured in the ALWTRP process. See response to Comment 237 for information on the management of marine mammal interactions with recreational fisheries.

Comment 295: One commenter states that NMFS should require all vessel anchoring systems to be brought back to the dock and not left unattended.

Response: NMFS is considering future rulemaking to address vertical line and will be discussing these issues with the ALWTRT at the next meeting. NMFS will discuss the practice of vessel anchoring at sea with the ALWTRT at that time.

1.1.23 Comments on Research

Comment 296: One commenter states that research concerning right whale behavior and its use of the water column is needed as there are gaps in information and high priority needs.

Response: NMFS agrees that more research is needed on right whale behavior and their use of the water column. To try to gather this needed information, NMFS developed a number of right whale biological needs priorities in support of the ALWTRP and included these in the 2006 NMFS Northeast Region's Request for Proposals for right whale research and Atlantic coast states right whale recovery plan programs. These priorities included the need for research on the horizontal and vertical distribution of right whales in the water column, including over rocky bottom and coral or wreck habitats, as well as research on the temporal and spatial distribution of right whales. In this final rule, NMFS is implementing broad-based measures to

further reduce the risk of serious injury and mortality to large whales from interactions with commercial fishing gear. In the future, NMFS will discuss with the ALWTRT the results of any projects that study right whale behavior and their use of the water column.

Comment 297: One commenter urged NMFS to consider right whale foraging research, specifically the recommendations from the Northern Gulf of Maine Foraging Workshop. The commenter stated a need to understand if large whales forage in rocky and tidal areas before requiring the investment in new gear.

Response: NMFS agrees that more information must be collected on large whale foraging behavior in rocky and tidal areas and some of this information is currently being gathered. For example, Maine DMR is working with a number of whale research organizations to gather zooplankton data along the coast of Maine to help determine if right whales may be foraging there. Once these data are collected and analyzed, the resulting information will be presented to the ALWTRT. At the present time, for both right and humpback whales, serious injuries and mortalities resulting from interactions with commercial fishing gear regulated under the ALWTRP continue to occur, and PBR has been exceeded. PBR for the North Atlantic stock of right whales is set at zero and for the Gulf of Maine stock of humpback whales, PBR is set at 1.3 (Waring *et al.*, 2006). Therefore, NMFS is required to take additional action to further reduce serious injury and mortality to large whales resulting from interactions with commercial fishing gear regulated under the ALWTRP. Also, see response to Comment 296.

Comment 298: One commenter suggested NMFS conduct research concerning large whale prey distribution and whale foraging areas, and how these tie into effective gear marking and how to effectively reduce risk of vertical lines.

Response: This is an area that both NMFS and the ALWTRT recognize as important. A variety of organizations are already conducting research on large whale prey items; for example, Maine DMR is working in conjunction with a number of whale research organizations to gather zooplankton data in Maine waters. In addition, NMFS developed a number of right whale biological priorities in support of the ALWTRP and included these in the 2006 NMFS Northeast Region's Request for Proposals for right whale research and Atlantic coast states right whale recovery plan programs. One priority included the need for research on the vertical distributions of both the processes and the prey organisms related to right whale foraging for habitat characterization and predictive modeling. See response to Comment 307.

Comment 299: Several commenters suggested NMFS research humpback and finback whale foraging, given they feed on different prey items than right whales. One commenter said that more whale research is needed to identify foraging areas, the availability of food, how it affects whales, migration patterns, and feeding habitats.

Response: NMFS agrees and continues to conduct research, as well as support research conducted by NMFS partners, on all the above mentioned topics.

Comment 300: One commenter suggested that NMFS work with Maine DMR to periodically review whale foraging and distribution and other sources of mortality.

Response: NMFS agrees and will continue to work with Maine DMR and other entities, including the ALWTRT, to study and review factors affecting whale foraging, distribution, and other sources of mortality.

Comment 301: One commenter suggested using humpback whales as proxies for right whales when testing new technology because of the larger population (i.e., permitting may be easier).

Response: As indicated in the FEIS for the SAM interim final rule (67 FR 1142, January 9, 2002) and this final rule, it is not feasible to conduct and evaluate experiments on right or humpback whale interactions with modified gear configurations. For obvious reasons, NMFS cannot conduct field tests or laboratory experiments on right or humpback whales to collect data to test new gear technology. However, NMFS is able to analyze past entanglement events and develop ways to modify gear in order to reduce risk of serious injury and mortality from future entanglement events. This information is discussed in the forum of the ALWTRT. In terms of gathering biological information on right whales, NMFS believes that in some cases humpback whales may be used as proxies for right whales. However, in most instances, right and humpback whales differ ecologically and behaviorally, so data collected on humpback whales may not be transferred to right whales in all cases. For example, humpback whales could not be used as a proxy to examine the entanglement risks associated with foraging behavior of right whales because the two species differ in their prey items as well as in the techniques they use to capture their prey.

Comment 302: Two commenters requested that NMFS consider the relative role of gear entanglements when compared to overall mortality estimates.

Response: Currently, there is no reliable method for estimating the number of large whales that die each year from entanglements, although recovered carcasses do provide minimum values. However, NMFS is responsible for applying the mandates and requirements set forth in the ESA and MMPA. Section 118 of the MMPA requires that NMFS reduce incidental mortality and serious injury of marine mammals resulting from interactions with commercial fishing gear. For this reason, it is not necessary to compare the relative role of fishing gear entanglements with overall large whale mortality estimates because by law, NMFS is required to address the issue of large whale interactions with commercial fishing gear. The FEIS provides a complete description of the status of the large whale stocks that are covered under the ALWTRP as well as the effects of commercial fishing on these species. Further, the PBR rate for North Atlantic right whales, as described in Waring *et al.*, 2006, is zero. The PBR for the Gulf of Maine stock of humpback whales is 1.3. For both right and humpback whales, serious injuries and mortalities resulting from interactions with commercial fishing gear regulated under the ALWTRP have occurred, and PBR has been exceeded. Therefore, NMFS is required to take additional action to further reduce serious injury and mortality to large whales

resulting from interactions with commercial fishing gear regulated under the ALWTRP. NMFS is implementing this final rule to further address large whale entanglements in commercial trap/pot and gillnet fisheries along the U.S. east coast. NMFS appreciates the work of all trap/pot and gillnet fishing industry members that are involved in the ALWTRT process.

Comment 303: One commenter stated that little gear testing has been done in the Southeast.

Response: A variety of gear research and testing, in particular focusing on gillnet gear, has been conducted by NMFS from North Carolina through Florida in conjunction with commercial fishermen. For example, for the sink and shark gillnet fisheries, NMFS has collected load cell data on the strains exerted when hauling the gear, as well as load cell data on the loads exerted on buoy and anchoring systems. These data are useful in making determinations about the operational feasibility of different weak link breaking strengths in these fisheries. In addition, NMFS is continuing to work with black sea bass fishermen to assess the use of sinking and/or neutrally buoyant groundline in this fishery.

Comment 304: One commenter requested that NMFS develop and propose an evaluation method to identify those gear modifications that genuinely reduce risk and those that do not make a difference in occurrence and/or seriousness of large whale entanglements. The commenter believes this information is critical to assessing and revising, as needed, gear modifications under the ALWTRP.

Response: NMFS agrees that ALWTRP management measures should be evaluated. At the 2005 ALWTRT meeting, a "Process for Considering Gear Modifications under the ALWTRP" was finalized and approved by the ALWTRT. This is a formalized process that describes how NMFS and the ALWTRT would handle gear modification proposals. This process identifies a standard set of questions that would be used for evaluating and responding to gear modifications. The five categories used to evaluate gear modification proposals are: product description, feasibility, risk reduction, relationship with current requirements under the ALWTRP, and recommendation of the ALWTRT. Gear modification proposals or ideas would be evaluated by regional ALWTRT subgroups, and gear modification recommendations from these subgroups would be presented to the full ALWTRT for possible incorporation into the ALWTRP.

Comment 305: One commenter stressed the importance of gear research. Additionally, commenters encouraged NMFS to continue promoting research initiatives that explore fishing techniques that reduce entanglement risk and develop new whale safe gear (including low profile groundline).

Response: NMFS agrees that gear research is an important component of the ALWTRP. NMFS developed a number of fishing gear research priorities and included these in the 2006 NMFS Northeast Region's Request for Proposals for right whale research and Atlantic coast

states right whale recovery plan programs. Such priorities include the need for reducing the risk associated with vertical line, as well as research for reducing the profile of groundline. The Right Whale Research Program specifically solicits the submission of idea projects in which a new device or process is developed, as well as pilot projects which involve developing an idea or concept and conducting at-sea testing involving one or more members of the fishing industry. The Atlantic Coast States Cooperative Planning for Right Whale Recovery Program encourages state agencies to apply for funding to further develop their right whale recovery programs, which in many cases includes conducting gear research. NMFS will continue promoting these research initiatives as funding allows and will work through the ALWTRT to maintain an updated list of gear research priorities, as well as priorities related to right whale biological needs in support of the ALWTRP. NMFS encourages the fishing industry, state partners, and others to work collaboratively with the agency to continue to develop new ideas and techniques that will reduce entanglement risk.

Comment 306: One commenter urged NMFS to work with scientists on devising an assessment program for determining how effective individual measures are for all whale species and understanding fishing practices and geography to adapt the plan accordingly.

Response: NMFS agrees that the ALWTRP management measures should be evaluated and that this should be done at the ALWTRT level, for which scientists are members. At the 2004 ALWTRT meeting, NMFS formed a Status Report Subcommittee that is responsible for discussing various issues including how the ALWTRT and NMFS should evaluate the ALWTRP. Feedback from the Status Report Subcommittee will then be provided to the full ALWTRT. See also response to Comment 305. The ALWTRT is composed of a wide variety of participants from many different backgrounds, including state and federal managers, scientists, the fishing industry, environmentalists, fishery management organizations, and more. At each meeting, the ALWTRT is briefed with the most recent available information on a variety of topics, including the species managed by the ALWTRP, as well as information about the fisheries that are regulated under the ALWTRP. The Status Report Subcommittee is the avenue by which ALWTRP monitoring will be discussed.

Comment 307: One commenter suggested combining the results of whale-related and gear-related research. The commenter encouraged further research on the seasonal distribution of buoy lines and the number of traps fished per buoy as well as the seasonal distribution of whale sightings and their prey (i.e., look at the probability of how these overlap in real time).

Response: This is an area that both NMFS and the ALWTRT are interested in exploring. NMFS is presently supporting an analysis that is examining the seasonal and temporal distribution of vertical lines for all trap/pot and gillnet fisheries. In addition, much right whale research is being conducted and supported by NMFS at this time. NMFS' NEFSC is currently conducting research to ultimately compare the density of fishing gear to the density of whales to develop a better picture of potential overlap. Ecological work is also being carried out in the Great South Channel to see how right whales are interacting with the sea floor; results will help

NMFS gain a better understanding of whale interactions with fixed fishing gear. Right whale foraging research is also being conducted and forms the foundation of critical habitat analyses currently being preformed by NMFS. Once these analyses are finalized, the results will be compiled and distributed to the ALWTRT. These results will then be used by NMFS and the ALWTRT when discussing different management options that can be used to reduce entanglement risk associated with vertical lines.

Comment 308: Commenters urged NMFS to do more research on: (1) fishing gear that works reliably and safely, under all weather conditions; and (2) how whales interact with fishing gear in order to know what kind of gear will keep whales free of entanglement.

Response: NMFS is committed to gear research and development and will continue to develop reliable and safe gear modifications. NMFS has gear laboratories and research teams that specifically focus on gear development and testing, incorporating tides, sea conditions, weather conditions, load cell data, and the size/and or weight of gear into their analyses. Additionally, NMFS contracts with researchers, individuals and companies to develop gear solutions.

NMFS agrees that it would be useful to determine how whales directly interact with fishing gear. However this would be difficult research to conduct without endangering right whales further, and is thus, not particularly tractable at this time.

Comment 309: One commenter stated that there needs to be more research done to examine appropriate gear modifications when necessary.

Response: See Response to Comment 306.

Comment 310: One commenter suggested that NMFS research include exempted areas.

Response: NMFS is working with states to help monitor exempted areas. Based on analysis of sightings data, NMFS understands that large whales may occasionally be reported in exempted waters such as bays and harbors, but believes that these occurrences are rare. If, in the future, whales are more frequently reported in exempted waters, NMFS and the ALWTRT will reevaluate the exemption lines for those particular areas to determine whether changes are needed.

Comment 311: One commenter requested that NMFS develop a prioritization scheme for granting scientific research permits that address critical bycatch, entanglement, or other conservation needs.

Response: NMFS recognizes the concern, however, it is not within the scope of this final rule.

Comment 312: One commenter questioned a NMFS study that indicated that more than 90 whales were killed between the early 1990s and 2002. The commenter asked what the cause

of death was in each case and specifically whether any were linked to lobster fishing because the study mentions ship strikes as cause of death. The commenter also requested a breakdown by year to determine whether there is an upward or downward trend during the reporting period. The commenter stated that data from 2003-04 are not presented, so it is difficult to determine if current steps taken by fishermen are working since not enough time has elapsed.

Response: For updated and complete reports on large whale mortality estimates, NMFS suggests Waring *et al.*, (2006) and/or Cole *et al.*, (2006). Data the commenter cites may not have been available when the DEIS was originally formulated; the report would have since been incorporated into current analyses where feasible. See Comment 4.

Comment 313: One commenter stated that the DEIS does not address the remotely operated vehicle (ROV) research conducted in Maine.

Response: NMFS has added text to Chapter 5 in the FEIS to address this research.

Comment 314: One commenter asked if NMFS is assuming that entanglement risks occur solely during foraging since research on other cetacean behavior and entanglement risks is not suggested.

Response: While the nature of foraging behavior is consistent with the mouth entanglements recorded, NMFS does not assume this is the only cetacean behavior that leads to entanglements. The potential for entanglement as a result of different behaviors is suggested by both the diverse geographic locations in which entanglements occur (see Chapter 4 of the EIS) and the parts of the whale on which gear or scarring are found (see Chapter 2 of the EIS).

1.1.24 Comments on Economic and Social Impacts (of the ALWTRP)

Comment 315: Several commenters suggested that the government issue grants to fishermen to help defray costs and replace old gear.

Response: NMFS understands that there are costs associated with converting gear to become compliant with the new ALWTRP requirements. To date, NMFS has supported two floating groundline gear exchange programs, and their purpose was to provide financial aid to commercial fishermen to replace their floating groundline with sinking and/or neutrally buoyant groundline. The first took place in 2004 and early 2005 and included participation from Massachusetts-licensed inshore lobster trap/pot fishermen. The second took place in January 2006 and sought the participation of state and/or federally licensed commercial trap/pot fishermen in New Jersey, Delaware, Maryland, Virginia, and North Carolina. Approximately $200,000 was spent replacing floating groundline with sinking and/or neutrally buoyant groundline in the Mid-Atlantic. Both programs involved the collection of actively fished floating groundline and the issuance of vouchers that fishermen used toward the purchase of

sinking and/or neutrally buoyant groundline. A similar floating groundline exchange program is underway for state and Federally licensed commercial trap/pot fishermen in the State of Maine. For additional information, see responses to Comments 85 and 93.

Comment 316: One commenter asked if it is possible for environmental groups to contribute money to do more research on whales and see where they go.

Response: NMFS welcomes collaborative partnerships with any group to help fund research on large whale distribution.

Comment 317: One commenter believes financial resources should be allocated to research and development and monitoring priorities as established within the TRT working group process.

Response: NMFS agrees that gear research is an important component of the ALWTRP and that ALWTRP priorities should be monitored. See responses to Comments 305 and 306.

Comment 318: One commenter said that the fishermen need resources allocated in order to conduct a collaborative research program that will: (1) document conditions in which fishermen work; (2) allow fishermen to work safely with no additional economic burden; and (3) find common sense answers and those applicable to areas where people fish with hybrid or other type of rope or gear that can be used.

Response: NMFS welcomes fishermen to apply for funding under the Right Whale Research Program, which requests proposals annually, contingent upon available funding, and focuses on funding projects that seek to reduce the risk of serious injury and mortality to right whales due to entanglement in commercial fishing gear. NMFS encourages the submission of proposals seeking to develop new gear modifications or pilot project designs to test newly developed or even existing gear modifications that have not yet been field tested on a larger scale. NMFS encourages applicants to work closely with NMFS in the development of ideas or concepts. Ideas or concepts that have been developed through this program, or through other means, will be presented/provided to the ALWTRT for discussion.

Comment 319: Some commenters stated that right whales are a federally protected species and, therefore, should be free of all entanglement and mortality risks due to fishing gear, regardless of the potential economic consequences for the fishing industry.

Response: NMFS is responsible for applying the mandates and requirements set forth in the ESA and MMPA. Accordingly, section 118 of the MMPA requires that NMFS reduce incidental mortality and serious injury of marine mammals resulting from interactions with commercial fishing gear. The FEIS provides a complete description of the status of the large whale stocks that are covered under the ALWTRP as well as the effects of commercial fishing on these species. Further, the PBR rate for North Atlantic right whales, as described in the most recent U.S. SAR, is set at zero. Similarly, the PBR rate for the Gulf of Maine stock of humpback

whales is set at 1.3 (Waring *et al.*, 2006). For both right and humpback whales, serious injuries and mortalities resulting from interactions with commercial fishing gear regulated under the ALWTRP have occurred, and PBR has been exceeded. Therefore, NMFS is required to take additional action to further reduce serious injury and mortality to large whales resulting from interactions with commercial fishing gear regulated under the ALWTRP. NMFS is trying to find a balance between allowing the fishing industry to continue to fish and protecting the endangered large whales that are protected under the ALWTRP. The only way that right whales would be free of all entanglement and associated serious injury and mortality risks due to fishing gear would be to enact gear closure areas throughout the species' range. However, the ALWTRP regulations favor broad-based gear modifications over area closures. Movement and location of whales is often difficult to predict with certainty, making gear modifications potentially more protective than closures of limited areas. Furthermore, closures may produce undesirable consequences such as concentrations of gear just outside of closed areas, which could increase entanglement risks to large whales.

Comment 320: Some commenters argued that the economic viability of east coast fisheries is at least as important as whale protection goals. They were concerned that additional costly fishery regulations would drive the fishing industry out of business.

Response: Due to the continued entanglements of the large whale species covered under the ALWTRP, NMFS is required to make further modifications to the ALWTRP. NMFS has chosen not to move forward with implementing new area closures; therefore, the new regulations favor broad-based gear modifications. In the FEIS, NMFS examines the economic, social, and biological impacts on commercial fishermen resulting from the modifications to the ALWTRP under the final preferred alternative. In addition, the Final Regulatory Flexibility Analysis (FRFA) in the FEIS considers the impacts of the proposed as well as final preferred alternatives on small entities and examines avenues for reducing the impacts. For further information on economic issues, see response to Comment 319.

Comment 321: One commenter asked if NMFS tested the use of sinking and/or neutrally buoyant groundline on Maine's rocky sea floor to determine that it is not economically devastating.

Response: NMFS has provided a number of fishermen along the coast of Maine, from Lubec to Kittery, with neutrally buoyant groundline in order for those fishermen to test at sea the feasibility of its use in the areas they fish. NMFS received feedback from some of these fishermen who fish on a variety of bottom types, including rocky bottom, that the line was fished successfully. Other fishermen reported that they experienced problems when using this type of line. It should be noted that anywhere along the East Coast, different fishermen are going to experience different issues with the use of sinking and/or neutrally buoyant groundline based on differences in tidal and weather conditions, gear configurations, and fishing practices.

Comment 322: One commenter said that section 118 of the MMPA allows consideration for the economics of the gillnet fishery and availability of existing technology as well as state

and regional FMP's.

Response: Section 118 (f)(2) of the MMPA includes both short-and long-term goals. Specifically it states that "the immediate goal of the take reduction plan for a strategic stock shall be to reduce, 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential biological removal level established for that stock under section 117" (16 U.S.C. 1387). Further, it states that "the long-term goal of the plan shall be to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans" (16 U.S.C. 1387). To achieve these goals, NMFS determined that additional modifications to the ALWTRP were warranted based on the continued serious injury and mortality of large whales in commercial fishing gear. See response to Comment 320.

Comment 323: One commenter stated that economic impacts are similar across the board, with most impact affecting the New England lobster fishery. The commenter does not see how NMFS can justify choosing Alternatives 3 and 6 as preferred over Alternatives 2 and 4, based on economic analysis and what is known about the Mid-Atlantic as a right whale migratory corridor. Another commenter also believed New England lobstermen are also disproportionately burdened.

Response: Based on comments received on the DEIS, NMFS has developed a new preferred alternative, Alternative 6 Final, that offers significantly lower economic costs while sacrificing little protectiveness. Chapter 8 of the EIS provides an overview of the costs and benefits of all the alternatives.

Because of the geographic concentration of the lobster fishery in New England (see Chapter 7) and the relatively large size of the lobster fishery, it is true that New England vessels bear a large share of the overall estimated costs of the ALWTRP modifications. Given whale movements and behavior, however, New England waters represent important areas for entanglement risk reduction. Furthermore, the social impact analysis suggests that under Alternative 6 Final (Preferred), only a limited subset of smaller vessels are likely to experience costs that represent a significant share of per-vessel fishing revenues. Finally, groundline buyback programs will help mitigate compliance cost impacts. See Comment 137.

Comment 324: One commenter stated that vessel compliance costs assume upper and lower bounds of complying are similar between vessel classes. The commenter states that, as noted in the DEIS, this could underestimate some vessel class revenue estimates and overestimate compliance cost impacts. The commenter also believes small sample sizes of vessel revenues are insufficient in providing accurate analysis of potential compliance cost estimates by vessel class. Therefore, the commenter requests that these economic and social impact analyses be corrected to be more representative.

Response: The commenter correctly recognizes the uncertainty inherent in both the cost and revenue analyses and the efforts made to characterize this uncertainty. It should be noted, however, that the direction of this uncertainty is unknown (i.e., the figures could be biased in the opposite direction of those stated by the commenter). Furthermore, the shortcomings of the revenue data (e.g., sample sizes for certain vessel classes and fisheries) are fully documented in Chapter 7 of the EIS; no better revenue sources are available at this time.

Comment 325: One commenter questioned DEIS Exhibit 7.4.1.2, which specified that vessel revenues were derived from the 2002 NMFS dealer database, yet are compared with compliance costs under future regulations (and, therefore, the likely impacts on employment). The commenter believes analysis is needed that will project the difference between the costs and revenues following the proposed implementation date of the new rules.

Response: Consistent with the comment, the analysis of vessel impacts ideally would compare costs and revenues following the introduction of the ALWTRP modifications; instead, the analysis compares with-regulation costs to pre-regulation revenues. Little information exists to assess how the ALWTRP modifications would affect vessel revenues; however, the nature and scale of the proposed regulatory changes would likely have little impact on harvests, prices, and other factors affecting vessel revenue. Therefore, even if comparison of post-regulatory costs and revenues were feasible, it is unlikely that such an analysis would result in markedly different socioeconomic impact conclusions.

Comment 326: One commenter said that the chart in Chapter 6 about economic analysis left out several counties and ports in New Jersey (Sea Isle City, Cape May, Belford, and Point Pleasant) that should have been considered in the economic analysis. The commenter said that all fishermen affected by the rule in those regions should be considered in the analysis, even those listed above that do not meet the criteria for at risk counties.

Response: The definition of at-risk communities inherently focuses on areas where the potential for ALWTRP impacts is significant in scale, as indicated by ALWTRP landings or vessels. As suggested by the commenter, however, other counties that do not meet the threshold criteria may realize significant impacts. Although the overall scale of these impacts may not be great, their importance to specific towns, neighborhoods, or vessels should not be overlooked. This point has been highlighted in the FEIS. In addition, the county-level analysis is intended to provide a broad idea of where impacts may be centered geographically. It is separate from the cost/revenue analysis, which considers all vessels, regardless of their landing port or home port.

Comment 327: One commenter said that it would probably cost fishermen $75,000 just to switch over to the rope plus a couple weeks worth of work. The costs includes the crew and everything else.

Response: While the model vessels analyzed in Chapter 6 of the FEIS are generalized and may not reflect costs for all individual vessels, NMFS does not believe that initial gear conversion costs (costs beyond routine gear replacement costs) will typically be as high as

$75,000. The analysis suggests that average initial investment costs are likely to be on the order of $39,000 for offshore vessels. While these vessels may realize high costs relative to revenues, fishermen have the option of seeking loans to finance the initial costs of converting their gear. In addition, initial conversion costs may be mitigated, at least in part, by current and future groundline buyback programs operated by NMFS and other partners.

Comment 328: One commenter expressed concern with the prices associated with changing to sinking rope. The commenter states that rope was $98 a coil last year and this year it was $113. Hence, the commenter believes that the rope price will go up. The commenter also believes that fuel is a major issue, stating that as fuel costs go up, the cost of rope will follow. It cost $10,000 for the commenter to switch over his rig in 2004 and in 2008 it may cost $15,000-20,000 or more depending on the price of fuel. The commenter also said that China is buying up all the materials needed to make this rope. The commenter asked what will happen in 2008, if the rope will be available, and the fishermen will be able to afford the rope.

Response: The commenter is correct in noting the positive relationship between oil costs and petroleum-based materials in groundline as well as the dynamic nature of oil prices. In the FEIS, the economic analysis has been revised to incorporate up-to-date prices for groundline, fuel, and other input parameters. Predicting future trends in oil prices is highly complex, however; therefore, the analysis does not attempt to forecast changes in input costs for future years.

Comment 329: One commenter stated that he spreads his expenses out over the year, and to absorb a massive expense that has been expensed over a period of 6 or 8 years does not work. A hundred percent of the burden of the expense of these requirements goes to the industry.

Response: The comment focuses primarily on the large initial investment that may be required to convert gear. Although costs are high for some vessels, NMFS made modifications to the final rule, based on public comment, to decrease costs where possible while still meeting its goals under the MMPA and ESA (see Changes from the Proposed Rule section of the preamble). While these vessels may still realize high costs relative to revenues, the impacts of converting to sinking and/or neutrally buoyant groundline may be defrayed, in part, by current and future groundline buyback programs operated by NMFS and other partners. In addition, although the requirements under Alternative 6 Final (Preferred) may impose significant costs within the first year after publication of the final rule (to convert all groundline to sinking and/or neutrally buoyant groundline), fishermen may be able to distribute the cost of the new gear over its useful life by seeking a loan. After the first year, ongoing costs would be significantly lower as fishermen would only need to replace worn-out and lost gear.

Comment 330: One commenter said that NMFS needs to think about social and economic impact to fishermen themselves, including the cost to change things around for fishermen and the social and economical factors going on.

Response: NMFS is sensitive to the costs of complying with this final rule and has

characterized the economic and social impacts in the FEIS. Chapter 7 of the EIS identifies vessel segments that may be heavily affected by the requirements and suggests that under Alternative 6 Final (Preferred), a limited number of small vessels are most at risk. As a result, harvest levels are unlikely to change and related industries (e.g., seafood processing) are not likely to be affected. Although costs are high for some vessels, NMFS made modifications to the final rule, based on public comment, to decrease costs where possible while still meeting its goals under the MMPA and ESA (see Changes from the Proposed Rule section of the preamble). While some vessels may still realize high costs relative to revenues, fishermen have some options to try to mitigate these costs. For example, the impacts of converting to sinking and/or neutrally buoyant grounline may be defrayed, in part, by current and future groundline buyback programs operated by NMFS and other partners.

Comment 331: One commenter said that it has been estimated recently that the economic benefit of the lobster fishery in Maine is 500 million dollars. This commenter stated that it was ironic that the fishermen were a week away from paying taxes and the same government that supports them is coming to them with alternatives that would severely impact, if not end, their way of life. The commenter said that Coastal Maine and coastal communities depend on the lobster fishery as part of their heritage and culture, as well as an economic base and there is nothing that can take its place.

Response: NMFS acknowledges the economic importance of the lobster industry and has attempted to characterize the harvest and processing sectors accurately in the EIS. The specific source of the commenter's $500 million figure is uncertain, but the estimate is not unreasonable given ex-vessel revenues and the regional economic contribution of industries that depend on fishing. However, the ALWTRP modifications contained in the final rule are not likely to have the severe implications suggested by the commenter. While costs may be high for some vessels, the compliance costs are generally commensurate with revenues, i.e., costs as a percent of revenue are not prohibitive. Chapter 7 identifies vessel segments that may be heavily impacted by the requirements and suggests that under Alternative 6 Final (Preferred), a limited number of small vessels are most at risk. As a result, harvest levels are unlikely to change and related industries (e.g., seafood processing) are not likely to be affected.

Comment 332: One commenter was concerned about the economic impacts of changing over from either neutrally buoyant rope or going to all sink rope. The commenter recently bought neutrally buoyant rope for $1.85/pound and does not understand where NMFS got $3,500 per boat cost. A few commenters believed that cost is too low, and that money spent on groundlines alone will be over $20,000.

Response: The per-vessel cost cited ($3,500) is the average across a variety of vessel size classes and is an annualized figure; that is, it represents the sum of annualized initial investment costs and annual maintenance costs. Consistent with the comment, the lump sum initial investment for most lobster vessels will be higher than annualized costs. Although costs are high for some vessels, NMFS made modifications to the final rule, based on public comment, to

decrease costs where possible while still meeting its goals under the MMPA and ESA (see Changes from the Proposed Rule section of the preamble). While these vessels may still realize high costs relative to revenues, fishermen have some options to try to mitigate the costs. For example, the impacts of converting to sinking and/or neutrally buoyant groundline may be defrayed, in part, by current and future groundline buyback programs operated by NMFS and other partners. In addition, although the requirements under Alternative 6 Final (Preferred) may impose significant costs within the first year after publication of the final rule (to convert all groundline to sinking and/or neutrally buoyant groundline), fishermen may be able to distribute the cost of the new gear over its useful life by seeking a loan.

1.1.25 Comments on Other Species

Comment 333: One commenter states that NMFS has not looked at the impacts on other species and has little basis to assume humpbacks, finbacks, and minke whales would benefit. The commenter states that right whales, which have different prey requirements, are the main target of conservation. This leads to different feeding and distribution, which may also lead to different conservation needs. The commenter believes NMFS should not rely on closures and gear modifications that only protect right whales because the agency may omit areas that are important to other large whale species.

Response: The ALWTRP is designed to reduce the risk of mortality and serious injury to large whales (right, humpback, and fin whales), with benefits to non-endangered minke whales, due to interactions with commercial fishing gear. The ALWTRP focuses on reducing entanglements of critically endangered North Atlantic right whales, whose population contains approximately 300 animals. NMFS established the areas and seasons being implemented in this final rule by analyzing databases that included right, humpback, and fin whale sightings. NMFS believes that the gear modifications being implemented, especially the requirement to use sinking and/or neutrally buoyant groundline, will benefit all large whale species by reducing entanglement risk of commercial fishing gear. In the future, NMFS will re-evaluate the ALWTRP with the ALWTRT if information becomes available indicating that the measures being implemented in this final rule are ineffective.

Comment 334: One commenter stated that there is an increase in lobster effort (800 in 1996 and 1400 today) and gear conflicts, and a decrease in herring abundance due to expanded trawling; therefore, there are fewer humpbacks, finbacks, and minke whales in Maine according to an article published in "Fisherman's Voice," April 2005.

Response: The information provided in the article in "Fisherman's Voice" with respect to large whales off the coast of Maine is anecdotal. NMFS does not estimate the local abundance of humpback, fin, and minke whale populations so it is difficult to determine the local abundance of these species off the coast of Maine. For further information on these species, please see the SAR (Waring *et al.,* 2006).

Comment 335: One commenter believed that the take levels for some whale species are so low that they could not be achieved. This commenter believed, therefore, that any takes resulting from whale entanglements in fishing gear would lead to more stringent fishery regulations.

Response: Under section 118 of the MMPA, NMFS is required to meet both the short and long-term take reduction plan goals of reducing serious injury or mortality from commercial fishing operations. The short-term goal is to reduce serious injury or mortality to below PBR, while the long-term goal is to achieve a level that is approaching a zero mortality and serious injury rate (i.e., ZMRG). Due to the continued entanglements of large whales in commercial fishing gear, NMFS is required to take additional action to further reduce the entanglement risk associated with commercial fishing gear. NMFS will continue to discuss with the ALWTRT any future modifications that will be made to the ALWTRP.

Comment 336: One commenter states that NMFS has not updated SARs and entanglement studies for finbacks or minke whales. Without scientific information, the commenter believes there is no way to assess impacts of entanglements on these stocks or the ALWTRP benefits to them.

Response: NMFS recently published updated SARs for all four of the large whale species affected by the ALWTRP (Waring et. al., 2006). Information from these and earlier SARs has been integrated into the FEIS.

1.1.26 Comments on Definitions

Comment 337: Some commenters questioned NMFS' basis for determining exempted areas. One commenter asked how "frequently" is defined in the DEIS. The commenter specifically referenced the DEIS language that states NMFS will re-evaluate exempted areas if right whales are frequently reported inside these areas.

Response: NMFS did not define "frequently" in the DEIS. NMFS believes, based on scientific data, that endangered large whales will rarely venture into bays, harbors, or inlets that have been exempted. Based on this, and other information provided in Appendix 3-A of the FEIS related to the exemption waters in final preferred alternative, NMFS believes the risk of gear to large whales in the exempted areas is minimal. However, NMFS will continue to monitor all exempted areas, and encourage states to develop contingency plans for large whales in these areas. Should new information become available that indicates that a change in the inshore or deep water exemption areas is warranted, NMFS will share the information with the ALWTRT and take appropriate action.

Comment 338: One commenter requested that NMFS define "weighted device" for enforcement purposes (i.e., "include a weak link on all flotation and/or weighted devices attached to the buoy line").

Response: NMFS agrees and has modified the regulatory text to identify acceptable "weighted devices". For example, a weighted device includes window weights, but does not include traps/pots, gillnets, anchors, or leadline woven into buoyline.

Comment 339: One commenter does not support the definition of a set gillnet, which is considered an anchored gillnet, and suggests a definition of a set gillnet as "any gillnet that is weighted, but does not have an anchor(s) on either end and returns to port with the vessel".

Response: Although various types of gillnets are included in the anchored gillnet definition, such as set and stab nets, NMFS recognizes that the nets may be fished in various ways. This issue is of particular relevance in the Mid-Atlantic. NMFS will discuss this with the ALWTRT and coordinate with other TRTs that may use this definition under section 229.2 to determine whether this type of change to the definition is appropriate.

Comment 340: One commenter stated that the proposed definition of wet storage of gear in the proposed rule at paragraph (c)(ii) on page 35922 (70 FR 35894, June 21, 2005) is not enforceable as currently written. The definition specifies that trap or pot gear must be hauled out of the water at least once every 30 days. The commenter is concerned that to prove this portion of the rule, an unsustainable amount of surveillance would be required to maintain visual proximity of a particular piece of gear.

Response: Thirty-day soak limits have been enforced. Enforcement actions based on the 30-day soak limit were taken in 10 cases in 2005.

Comment 341: NMFS received one comment regarding the definition of weak links on page 35922 (ii)(B)(1) of the proposed rule (70 FR 35894, June 21, 2005). The commenter states that USCG personnel will be unable to determine the breaking strength of any type of weak link unless the breaking strength is clearly indicated by the manufacturer.

Response: NMFS believes that the weak link requirements are enforceable. In the regulations, NMFS references a brochure that outlines the weak link techniques currently approved to assist in compliance with and enforcement of the regulations, and specifies how to obtain the brochure. NMFS has worked with the USCG in the past to provide training and tools for enforcement efforts. NMFS will continue to provide necessary additional training and tools to the USCG to support enforcement of the ALWTRP.

Comment 342: NMFS received one comment regarding the definition of tending/anchoring/weak links on page 35927, (ii)(c), of the proposed rule (70 FR 35894, June 21, 2005). This section states that all gillnets must return to port with the vessel unless the gear meets the required specifications. The commenter states that a USCG officer has no way of determining whether in-situ gear is in compliance with weak link or anchoring requirements. To enforce this, a law enforcement officer would need to be present during gear set or retrieval. Additionally, the commenter states that some requirements (e.g., breaking strength) may be impossible to determine on scene, undermining the intended effect of this regulation.

Response: Although the ALWTRP regulations are complex, NMFS believes they are enforceable. NMFS has worked with the USCG in the past to coordinate during the development of regulations, and as well as to provide training as noted in the response to Comment 341. Additionally, NMFS will work with the USCG on a coordinated plan to facilitate enforcement of the ALWTRP.

Comment 343: NMFS received one comment regarding the definition of gear requirements on page 35923 (iii)(B) of the proposed rule (70 FR 35894, June 21, 2005), specifically "No person may fish with or have available for immediate use trap/pot gear." The commenter suggested clearly defining the term "available for immediate use" for law enforcement personnel. The commenter stated that a good example is found in enforcement of Turtle Excluder Devices (TEDs), where shackling the trawl to the doors is indicative of "available for immediate use". Without amplifying information, the commenter believes that arbitrary and capricious enforcement may result.

Response: NMFS agrees and has modified the regulatory text to address this issue.

Comment 344: NMFS received one comment regarding the definition of "groundline" on page 35923 (5)(ii)(B) of the proposed rule (70 FR 35894, June 21, 2005). That section states that all groundlines must be composed entirely of sinking or neutrally buoyant line unless exempted. The commenter states that if this line is not labeled as sinking or neutrally buoyant, it will not be recognized as a violation. A USCG boarding officer will only see the line coiled on deck or under strain as it is in the process of being hauled back or set and neither condition will demonstrate compliance with the regulation.

Response: In this final rule, NMFS is amending the definitions of "neutrally buoyant line" and "sinking line" and is clarifying each definition in relation to groundlines and buoy lines. Also, to provide a clearer definition of neutrally buoyant and sinking line, NMFS has developed criteria for establishing a density standard for neutrally buoyant and sinking line and used these criteria to develop the definitions. NMFS will finalize a procedure for assessing the specific gravity of line, which NMFS will use in the future to determine whether a manufactured line meets the accepted density standard, through this final action. Additionally, NMFS is developing guidance for law enforcement officers on how to evaluate whether line is sinking/neutrally buoyant or floating in the field.

Comment 345: NMFS received one comment regarding the definition of "anchoring system" on page 35926 (ii)(C) of the proposed rule (70 FR 35894, June 21, 2005). The commenter believes the requirement to have a burying anchor is easily enforceable, but it will be difficult to determine if the different types that will be encountered will have a holding capacity equal to or greater than a 22-lb (10.0-kg) Danforth-style anchor. The commenter suggested providing the USCG with a table that identifies all the anchoring systems of these types that meet the holding capacity requirement.

Response: NMFS believes that the anchoring requirements are enforceable. In the

regulations, NMFS references a brochure that outlines how to comply with any anchoring requirements to assist in compliance with and enforcement of the regulations, and specifies how to obtain the brochure. NMFS has worked with the USCG in the past to provide training and tools for enforcement efforts. NMFS will continue to provide any necessary additional training and tools to the USCG to support enforcement of the ALWTRP.

Comment 346: NMFS received one comment regarding the definition of "night" on page 35932 of the proposed rule (70 FR 35894, June 21, 2005). The commenter suggests changing the definition to "Night means, with reference to the regulated waters of Georgia and Florida, any time after official sunset and before official sunrise as determined for the date and location in the nautical Almanac, prepared by the U.S. Naval Observatory".

Response: NMFS proposed definitions of sunset and sunrise that referenced the National Almanac, prepared by the U.S. Naval Observatory. However, since proposing definitions in 50 CFR 229.2 for "sunrise" and "sunset", these definitions were added through the BDTRP (71 FR 24776, April 26, 2006). Thus, the definitions in 50 CFR 229.2 are as follows: "Sunrise means the time of sunrise as determined for the date and location in the Nautical Almanac, prepared by the U.S. Naval Observatory;" and "Sunset means the time of sunset as determined for the date and location in the Nautical Almanac, prepared by the U.S. Naval Observatory." NMFS believes that these modifications will make the "night" definition clearer and more enforceable.

Comment 347: One comment was received regarding the definition of special provision for strike nets on page 35929 (5)(i)(A) of the proposed rule (70 FR 35894, June 21, 2005). This paragraph states that no nets can be set at night when visibility is less than 500 yards (457.2 m or 1,500 ft). The commenter believes this would be subjectively enforced. The commenter recommended less subjective language (e.g., "No nets may be set after official sunset as determined for the date and location in the Nautical Almanac, prepared by the U.S. Naval Observatory").

Response: The regulations require, amongst other requirements, that no nets are set at night or when visibility is less than 500 yards (1,500 ft, 457.3 m). Night is currently defined under 50 CFR 229.2 as anytime between one half hour before sunset and one half hour after sunset. Through this final rule, NMFS is defininig sunset and sunrise by referencing the Nautical Almanac prepared by the U.S. Naval Laboratory.

1.1.27 Clarification Requests for the FEIS

Comment 348: One commenter asked if the RPA measures (developed pursuant to ESA section 7) contained in the DEIS alter the reasonable and prudent measures that have previously been incorporated into the ALWTRP through past rulemakings.

Response: The measures described in the DEIS were developed by NMFS through feedback received during meetings with the ALWTRT, as well as through public scoping and

comment, not as a result of a section 7 consultation on any Federal action. A section 7 consultation has been reinitiated to examine the effects of the Federal lobster fishery, as modified by the existing ALWTRP and RPA for right whales. This consultation is in progress. NMFS has also reinitiated consultation on the continued implementation of the Federal summer flounder, scup, and black sea bass fisheries that are managed under the Summer Flounder, Scup, and Black Sea Bass FMP, based on new information that suggested effects to listed species as a result of the black sea bass and scup trap/pot fisheries in a manner or to an extent not previously considered. This consultation is on-going. NMFS will consider the provisions of this final rule during consultation on the continued implementation of the Summer Flounder, Scup, and Black Sea Bass FMP. NMFS will also consider, based on the criteria for reinitiating consultation (50 CFR 402.16), whether formal consultation for the continued implementation of the Northeast Multispecies, Monkfish, and Spiny Dogfish FMPs must be reinitiated as a result of the changes to the ALWTRP. Section 7 consultations completed June 14, 2001, on the continued implementation of these FMPs concluded that the fisheries would jeopardize the continued existence of right whales. An RPA was provided, and the regulatory components were implemented as part of the ALWTRP. NMFS has determined that the operation of other federally-managed fisheries (e.g. HMS, Coastal Pelagics, Snapper/Grouper) will not jeopardize the continued existence of right whales or any other large whale species managed under the ALWTRP.

Comment 349: One commenter asked NMFS to discuss the need for additional ESA section 7 consultations to address the potential impacts of the revised ALWTRP on right whales and other listed species in the FEIS.

Response: An informal consultation under the ESA was concluded for the rule to modify the Atlantic Large Whale Take Reduction Plan on December 21, 2004. As a result of the informal consultation, the Regional Administrator determined that the measures to modify the ALWTRP are not likely to adversely affect ESA-listed cetaceans, sea turtles, fish, or critical habitat that occur within the area affected by the rulemaking. Modifications are being made to the ALWTRP by this final rule to more broadly address the incidental entanglement of large whales in fishing gear that result in serious injury and mortality. Some of these modifications (e.g., regulating additional trap/pot and gillnet fisheries under the ALWTRP, requiring the broad-based use of sinking and/or neutrally buoyant groundline) are expected to have an effect on ESA-listed species. However, depending on the species, all of the effects are expected to be either beneficial or negligible.

Comment 350: One commenter said that on p. 3-6 of the DEIS, the driftnet provisions needed to be clarified.

Response: NMFS has made a variety of edits and clarifications in Chapter 3 of the FEIS that may better characterize proposed changes for driftnet vessels.

Comment 351: One commenter asked NMFS to clarify DEIS pg. 5-40; as the commenter detected a contradiction between whale distribution and when the requirements are required.

Response: NMFS disagrees. The alternatives under consideration in the DEIS considered whale distribution when determining the time periods of the requirements. Although whales may be present outside a seasonal window, the sightings are rare, and the risk of gear to large whales at these times of the year is minimal. However, NMFS will continue to monitor the areas where seasonal requirements are in effect. Should new information become available that indicates that a change in seasonal window is warranted, NMFS will share the information with the ALWTRT and take appropriate action. See response to Comment 41.

Comment 352: One commenter states that the hazards to whales and areas of most risk need to be clarified.

Response: The ALWTRP regulations favor broad-based gear modifications over additional special management areas. Movement and location of whales is often difficult to predict with certainty. However, as NMFS continues to conduct rulemaking to achieve the goals of the ALWTRP, special management areas could be defined in the future.

Comment 353: Some commenters urged NMFS to include a discussion in the FEIS about the effectiveness of weak links because they are treated as an important risk reducing element, but effectiveness is still unclear. One commenter states that in the DEIS, NMFS indicates the agency believes weak links might work, but does not provide data or analysis on how frequently weak links have failed to prevent entanglements in cases for which gear was examined. Another commenter stated that the DEIS leaves a false impression that weak links are known to be effective in reducing entanglements and that using such devices would reduce bycatch to required PBR levels.

Response: NMFS has added additional clarification in the FEIS on these issues regarding weak links. Evidence that weak links help prevent whale entanglements is discussed in Chapter 5, Section 5.1.1.3 of the FEIS. Section 5.2 discusses impacts on non-whale species and explicitly acknowledges that weak links are not likely to reduce bycatch of most non-whale species; only whale species with the size/strength to break weak links are likely to benefit from weak link requirements.

Comment 354: One commenter states that the DEIS is incorrectly describing collaborative real and simulated fishing and field tests conducted by fishermen and the NMFS gear research team as "simulated whale entanglements".

Response: A search of the entire EIS document yielded no instances of the term “simulated whale entanglements” or a discussion of the tests mentioned by the commenter.

Comment 355: One commenter referenced page 2-39 of the DEIS, in which NMFS reports that 9 fatal entanglements and 22 live entanglements of large whales were observed in 2002, after the most recent revisions of the ALWTRP. The commenter requested that NMFS address this in the FEIS, as caveats were not taken into account in the DEIS.

Response: Data on entanglements occurring since the most recent revisions to the ALWTRP have been updated using finalized figures published in the 2003 Stock Assessment Report (Waring et al., 2006). Apart from the general caveats applying to all entanglement information, additional caveats are no longer appropriate.

Comment 356: One commenter states that the DEIS does not provide the history or context of right whale status relative to federal efforts to protect whales and fails to consider cumulative effects of all sources of mortality on right whales.

Response: NMFS disagrees. The DEIS and FEIS provide a status of right whales (Chapter 4-Affected Environment), as well as a cumulative effects analysis (Chapter 9-Cumulative Effects Analysis) that considers various sources of mortality to right whales, including the following sources of mortality: commercial whaling, ship strikes, water pollution, noise pollution, climate change, and prey availability.

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