

or we finalize the companion proposal to authorize the State's changes to its hazardous waste program, we may, at a later date, amend 40 CFR part 272, subpart HH to codify New York's authorized program.

L. Statutory and Executive Order Reviews

This rule only authorizes hazardous waste requirements pursuant to RCRA 3006 and imposes no requirements other than those imposed by State law. Therefore, this rule complies with applicable executive orders and statutory provisions as follows.

1. *Executive Order 12866: Regulatory Planning Review*—The Office of Management and Budget has exempted this rule from its review under Executive Order 12866 (56 FR 51735, October 4, 1993).

2. *Paperwork Reduction Act*—This rule does not impose an information collection burden under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

3. *Regulatory Flexibility Act*—After considering the economic impacts of today's rule on small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), I certify that this rule will not have a significant economic impact on a substantial number of small entities.

4. *Unfunded Mandates Reform Act*—Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act (Pub. L. 104-4).

5. *Executive Order 13132: Federalism*—Executive Order 12132 (64 FR 19885, April 23, 1997) does not apply to this rule because it will not have federalism implications (*i.e.*, substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government).

6. *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*—Executive Order 13175 (65 FR 67240, November 6, 2000) does not apply to this rule because it will not have tribal implications (*i.e.*, substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes).

7. *Executive Order 13045: Protection of Children from Environmental Health*

& *Safety Risks*—This rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant and it is not based on health or safety risks.

8. *Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use*—This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action as defined in Executive Order 12866.

9. *National Technology Transfer Advancement Act*—EPA approves State programs as long as they meet criteria required by RCRA, so it would be inconsistent with applicable law for EPA, in its review of a State program, to require the use of any particular voluntary consensus standard in place of another standard that meets the requirements of RCRA. Thus, section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 272 note) does not apply to this rule.

10. *Congressional Review Act*—EPA will submit a report containing this rule and other information required by the Congressional Review Act (5 U.S.C. 801 *et seq.*) to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This action will be effective on March 14, 2005.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended (42 U.S.C. 6912(a), 6926, 6974(b)).

Dated: November 23, 2004.

Kathleen C. Callahan,

Acting Regional Administrator, Region 2.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222, 224 and 226

[Docket No. 041221357-4357-01; I.D. 113004A]

RIN 0648-AS94

Endangered Marine and Anadromous Species; Final Rule to Remove Technical Revisions to Right Whale Listing Under the U.S. Endangered Species Act

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to remove two technical revisions made in an April 2003 final rule to the northern right whale (*Eubalaena sp.*) listing under the Endangered Species Act (ESA). The technical revisions purported to change: the way right whales are listed by splitting the endangered northern right whale into two separate endangered species - North Pacific right whale and North Atlantic right whale; the definition of "right whale" as it applies to the right whale approach regulations; and the section heading for right whale critical habitat. NMFS has determined that issuance of the 2003 final rule did not comply with the requirements of the ESA. This final rule corrects these mistakes by removing these technical revisions to 50 CFR and reinstating the language that existed before April 2003.

DATES: This rule takes effect on January 11, 2005.

ADDRESSES: Supporting documentation is available by request from the Chief, Endangered Species Division, NMFS, 1315 East-West Highway, F/PR3, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Marta Nammack, NMFS, Endangered Species Division, (301) 713-1401, ext. 180.

SUPPLEMENTARY INFORMATION:

Background

Right Whale Listing

From 1970 through 1975 the endangered and threatened species lists maintained by NMFS (50 CFR 224.101(b)) and the U.S. Fish and Wildlife Service (FWS) both identified endangered right whales as "Right whales (*Eubalaena spp.*).". In 1980 the FWS list identified the listing as "Whale, right...*Balaena glacialis*" and in

1993, as “Whale, right...*Balaena glacialis* (inc. *australis*),” but the NMFS list continued to identify the listed entities as “Right whales (*Eubalaena* spp.).” Through the years taxonomists have had different opinions on the proper genus name for right whales and on the number of species of right whales, but NMFS interpreted the listing to mean that two separate species were listed as endangered: northern right whale (*Eubalaena glacialis*) and southern right whale (*Eubalaena australis*). This was consistent with the view of most taxonomists at the time of listing.

April 2003 Technical Revision

On April 10, 2003, NMFS (henceforth, we) published a final rule (68 FR 17560) that purported to split the single endangered northern right whale species listed in 50 CFR 17.11 (Whale, right - *Balaena glacialis*) into two endangered species - North Atlantic right whale (*Eubalaena glacialis*) and North Pacific right whale (*Eubalaena japonica*). The intent of replacing the genus *Balaena* with *Eubalaena* was to correct the genus name in the FWS listing, a technical change. The intent of changing the listing from one northern right whale species to two species North Pacific right whale and North Atlantic right whale was to recognize the best available scientific information, which indicated that the population in the North Atlantic was genetically distinct from the population in the North Pacific. At the time, we considered this second change also to be a technical change that did not require a notice and comment period. We did not make the same change to 50 CFR 224.101(b) because we believed that “Right whales (*Eubalaena* spp.)” would already include any species that is subsequently recognized within the same genus.

To be consistent with the changes described above, we also amended: (1) the definition of “right whale” in 50 CFR 222.102 so that the approach regulations in 50 CFR 224 would apply only to western North Atlantic right whales; and (2) the heading of 50 CFR 226.203 to indicate that critical habitat was designated only for the North Atlantic right whale.

The technical revision did not purport to affect the status or taxonomy of the southern right whale.

ESA Section 4 Listing Procedure

The process for determining whether species should be added to the Federal list of threatened and endangered species under the ESA is specified in section 4 of the ESA and informed by the definition of “species,” “endangered

species,” and “threatened species” found in section 3. However, the final rule we published in April 2003 was procedurally and substantively flawed. First, we did not follow the public notice and comment procedural requirements outlined in section 4 for listing a species as endangered or threatened. Second, we did not meet the ESA’s substantive requirements of conducting a review of the status of the species to determine whether each species is endangered or threatened as a result of any of the five listing factors in that section.

In addition, we did not have the authority to make any changes to 50 CFR 17.11 because 50 CFR part 17 is solely within the jurisdiction of the FWS. Because we did not have the authority to amend 50 CFR 17.11, the changes we purported to make in that part are not valid. The status of right whales reverts to the pre-April 2003 status such that all right whales are endangered either as *Eubalaena glacialis* (Northern right whales) or *Eubalaena australis* (Southern right whales). We will request that FWS remove the changes to eliminate confusion regarding the listed entities.

Final Rule

We also are removing the April 2003 technical revisions to 50 CFR 222.102 and 50 CFR 226.203 so that they revert to the pre-April 2003 language. This will amend the definition of “right whale” as used in the right whale approach regulations found at 50 CFR 224 to read, “*Right whale* means, as used in § 224.103(c), any whale that is a member of the western North Atlantic population of the northern right whale species (*Eubalaena glacialis*).” This will also amend the heading in 50 CFR 226.203 to read, “§ 226.203 Critical Habitat for northern right whales--Northern Right Whale (*Eubalaena glacialis*).” For the sake of consistency, we are also changing the heading of 50 CFR 224.103(c) from “*Approaching North Atlantic right whales—(1) Prohibitions*” to “*Approaching right whales—(1) Prohibitions*.”

Next Steps under Section 4

In order to be eligible for listing under the ESA as either endangered or threatened, a group of organisms must constitute a “species,” which the ESA defines to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.” Under section 4 of the ESA, the listing determination must be made “solely on the basis of the best scientific and

commercial data available.” When considering a species for listing under the ESA, NMFS considers whether a species is endangered or threatened as a result of any of five statutorily enumerated factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence.

We plan to conduct a status review of the northern right whale to determine whether it consists of more than one species as defined by the ESA. If we make that determination, we will evaluate the status of each species to determine whether it is endangered or threatened as a result of any of the five listing factors, publish a summary of our conclusions regarding the listing factors, and, if warranted, publish a proposed rule to list each entity in accordance with section 4 of the ESA and 50 CFR 424.16. In addition, the notice of a proposed rule to list any species would contain the complete text of the proposed rule, a summary of the data on which the proposed rule is based (including, as appropriate, citation to pertinent information sources), and the relationship of such data to the proposed rule.

In addition, section 4(a)(3) of the ESA requires that, to the maximum extent prudent and determinable, critical habitat be designated for a species concurrent with making a determination that it is endangered or threatened. Therefore, if we determine that we should list species of right whales different from the northern right whale, we will also designate, to the maximum extent prudent and determinable, any habitat determined to be critical habitat of each of the new species proposed for listing. We will issue proposed and final rules to make the necessary determinations regarding critical habitat for any new species to be listed. We plan to complete this process by the end of 2006.

Classification

Administrative Procedure Act

The Assistant Administrator for Fisheries, NMFS, finds good cause exists to waive the requirement for prior notice and the opportunity for comment pursuant to 5 U.S.C. 553(b)(B) as well as the requirement for a delay in the effective date pursuant to 5 U.S.C. 553(d)(3). Such procedures are unnecessary because this rule merely

removes changes in the CFR that are not valid because they were never promulgated properly.

Executive Order 13132 - Federalism

Executive Order 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this rule.

Executive Order 12866

This final rule is exempt from review under Executive Order 12866.

Regulatory Flexibility Act

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

List of Subjects

50 CFR Part 222

Administrative practice and procedure, endangered and threatened species, exports, imports, reporting and recordkeeping requirements, transportation.

50 CFR Part 224

Administrative practice and procedure, endangered and threatened marine species, exports, imports, reporting and recordkeeping requirements, transportation.

50 CFR Part 226

Endangered and threatened species.

Dated: January 4, 2004.

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

■ For the reasons set out in the preamble, 50 CFR parts 222, 224 and 226 are amended as follows:

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

■ 1. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701.

■ 2. In § 222.102, the definition for “Right whale” is revised to read as follows:

§ 222.102 Definitions.

* * * * *

Right whale means, as used in § 224.103(c), any whale that is a member of the western North Atlantic population of the northern right whale species (*Eubalaena glacialis*).

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PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 3. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 4. In § 224.103, section heading of paragraph (c) is revised to read as follows:

§ 224.103 Special prohibitions for endangered marine mammals.

* * * * *

(c) *Approaching right whales*—(1) *Prohibitions.*

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PART 226—DESIGNATED CRITICAL HABITAT

■ 5. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 6. In § 226.203, the section heading and the introductory text are revised to read as follows:

§ 226.203 Critical habitat for northern right whales.

Northern Right Whale (*Eubalaena glacialis*)

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