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#### List of Subjects

##### 47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Telecommunications.

##### 47 CFR Part 61

Access Charges, Communications common carriers, Telephone.

##### 47 CFR Part 69

Communications common carriers, Telephone.  
Federal Communications Commission.

Magalie Roman Salas,  
Secretary.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 224

[Docket No. 000225052-005201; I.D. 102599C]

RIN 0648-AN29

#### Regulations Governing the Approach to Humpback Whales in Alaska

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes to prohibit the approach within 200 yards (182.8 m) of a humpback whale, *Megaptera novaeangliae*, in waters within 200

nautical miles (370.4 km) of the coast of Alaska. Under these regulations, it would be unlawful for a person subject to the jurisdiction of the United States to approach, by any means, within 200 yards (182.8 m) of a humpback whale. This action is necessary to minimize disturbance to humpback whales in waters off Alaska. It is intended to promote conservation and recovery of humpback whales.

**DATES:** Comments must be submitted by August 10, 2000.

**ADDRESSES:** Mike Payne, Assistant Regional Administrator, Protected Resources Division, NMFS, Alaska Region, P.O. Box 21668, Juneau, Alaska 99802-1668. Comments also may be sent via facsimile (fax) to 907/586-7012. Comments will not be accepted if sent via email or Internet. Courier or hand delivery of comments may be made to NMFS in the Federal Building, Room 461, Juneau, AK 99801.

**FOR FURTHER INFORMATION CONTACT:** Kaja Brix, NMFS Alaska Region, 907/586-7235, or Jeannie Drevenak, Permits Division, NMFS Office of Protected Resources, 301/713-2289.

#### SUPPLEMENTARY INFORMATION:

##### Species Description

The humpback whale, *Megaptera novaeangliae*, is a highly migratory species that is found in all oceans of the world. Humpback whales, listed as endangered under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* (ESA), are baleen whales belonging to the family Balaenopteridae. Humpback whales frequenting the North Pacific basin spend the winter months in the warmer tropical waters off Hawaii, Mexico and southern Japan. The summer feeding range of these animals extends along coastal inland waters of British Columbia, southeast Alaska, through western Alaska to Russia, and as far north as the Bering Sea.

Humpback whales in the North Pacific have been divided into three stocks: (1) the California/Oregon/Washington and Mexico stock; (2) the Central North Pacific stock; and (3) the Western North Pacific stock (NMFS 1999; Calambokidis *et al.* 1997). The Central and Western North Pacific stocks feed during summer months in the waters of coastal Alaska. The Central North Pacific stock of humpback whales winters in Hawaiian waters and migrates to feeding grounds in the summer months in northern British Columbia/Southeast Alaska and Prince William Sound west to Kodiak (NMFS 1998, 1999). The Western North Pacific stock winters in the waters off Japan and

likely spends summer months feeding in coastal Alaska waters west of the Kodiak Archipelago (NMFS 1998).

Prior to commercial whaling the worldwide population of humpback whales was thought to have been in excess of 125,000 animals (NMFS 1991). Approximately 15,000 animals were believed to have been present in the North Pacific prior to 1905. Humpback whales were heavily hunted until the International Whaling Commission banned commercial harvest in 1966 (Rice 1978). As a result of commercial whaling the North Pacific population may have been reduced to as low as 1,000 animals (Rice 1978). Recent population estimates indicate that the numbers are greater than immediately post-harvest, but have not yet reached the level estimated for the time period prior to intensive whaling. The current annual abundance estimate for the North Pacific population is 6,010 animals (Calambokidis, *et al.* 1997). The abundance of the Central North Pacific stock is estimated to be 4,005 animals (Straley 1994, NMFS 1998).

Annual abundance estimates have also been calculated for feeding aggregations of the Central North Pacific stock of humpback whales in specific locations off Alaska (NMFS 1998). The estimate for Prince William Sound is less than 200 animals; for southeast Alaska, 404 animals; and for the Kodiak Island region, 651 whales. These estimates represent minimum estimates for the three known feeding areas because the study areas do not include the entire geographic region. Little is known regarding humpback whale abundance between feeding areas, for example, south of Chatham Strait and west of Kodiak Island.

An extensive data set exists on the seasonal movements and distribution of humpback whales in the North Pacific, primarily for the Central North Pacific stock. The Western North Pacific stock is not as well studied, due primarily to the remote locations in which these animals range. Humpback whales generally spend the period between early spring to late fall in localized coastal areas engaged in intensive feeding activity.

Humpback whales congregate in the waters of their summer range in distinct feeding aggregations (Baker *et al.* 1987, 1990 in Baker, *et al.* 1992), with the same whales returning repeatedly to localized feeding areas. The identified feeding areas in Alaska for the Central North Pacific stock are southeast Alaska, Prince William Sound and Kodiak Island. Interchange among feeding areas has been at very low rates, usually involving just a few individuals

(Calambokidis, et al 1997). Site-fidelity of feeding humpback whales appears to be maternally directed and is likely a learned event. Mothers may bring their calves to a unique feeding site and the calves, once weaned, return to these same areas. Calves have been documented to return to the same feeding sites as adults and with their own offspring (Straley 1984).

Humpback whales feed singly or in groups using several different feeding strategies to capture their prey. Some of the common feeding behaviors in southeast Alaska include "browsing" conducted by individual animals; non-synchronized diving behavior; "lunge" feeding; and bubble-net feeding. Lunge feeding is a cooperative feeding behavior employed by a loosely assembled group of animals. The whales also use a technique referred to as "bubble net" feeding that involves the animal diving near an aggregation of prey, releasing bubbles to concentrate (i.e., herd) the prey and surfacing through the bubbles to capture the prey.

Humpbacks feed mainly on small schooling fishes, such as herring, walleye pollock, capelin and sandlance, and large zooplankton, such as krill (Wing and Krieger 1983, Krieger and Wing 1986, Krieger 1988). The productive temperate waters off Alaska have historically contained large numbers of herring schools and krill patches in inland coastal waters in predictable locations. Humpback whales, although not limited to these areas, return to specific feeding locations such as Frederick Sound, Chatham Strait, North Pass, Sitka Sound, Glacier Bay, and Prince William Sound, as well as other coastal areas of similar prey concentrations.

#### Whale Watching Activity in Alaska

The predictable nature of summer distributions of feeding North Pacific humpback whales provides the opportunity for whale watching activity in Alaska waters. Humpback whale prey appear to concentrate consistently and the intensive feeding behavior of the whales results in animals remaining in relatively defined areas over long periods of time. These feeding locations are often areas easily accessible from coastal communities. This combination of factors has recently led to extensive development of the whale watch industry.

Dedicated wildlife excursions in Alaska waters include both day trips that originate out of specific coastal communities in southeast and south central Alaska, and overnight package tours. The coastal hubs of this industry are, principally, the southeast Alaska

communities of Petersburg, Juneau, Sitka, and Gustavus, as well as Seward and Homer in south central Alaska. The tours range from several hours in duration to day-long trips.

Most whale watching activity occurs within less than a couple of hours of the coastal town from which it originates. This often means that the same group of whales in a local feeding area is continually exposed to vessel traffic throughout the duration of the whale watching season.

Except for those trips that conduct whale watching as a sideline to a sport fish charter, most of the tours generally follow a specific route, stopping at known humpback whale feeding sites, as well as specific sites occupied by other marine wildlife. Depending on the schedule of the tour, the vessels may stop to view feeding humpbacks for the length of several dive cycles, i.e., 20 minutes, or for extended periods of time up to an hour or more.

The whale watching season in Alaska typically starts in early to mid-May as the whales, and subsequent influx of tourists, arrive in the state. Tours generally operate on a daily basis through late fall.

Whale watch activities are conducted from a variety of platforms: small vessels supporting recreational boaters, kayaks, sport fishing/wildlife viewing charters that can carry 6 passengers, and larger 100–150 foot vessels capable of carrying 100 or more passengers. The majority of vessels have conventional prop-driven engines; some of the newer and larger catamarans are water-jet propelled.

Whale watching is unregulated in Alaska, except for the waters of Glacier Bay, regulated by the National Park Service, which established a minimum approach distance of 1/4 mile (440 yards or 0.4 km) from humpback whales. Whale watching vessels in Alaska that carry paying customers must obtain Coast Guard-regulated licenses to carry passengers and must have state business licenses to operate.

#### Impact of Vessel Traffic on Whales

Adverse impacts to marine mammals from whale watching could occur in several ways: direct physical impact from a vessel strike; noise effects could impede echolocation in some whales or damage or interfere with hearing; disruption and alteration of normal feeding, resting and other critical behaviors; habitat modification; and reduced fitness; all of which may ultimately lead to reproductive effects and population level changes.

Studies of vessel impacts to marine mammals have more often looked at

short-term effects (e.g., measuring disturbance or avoidance behaviors) rather than long-term or cumulative effects of repeated exposure to numerous vessels over time (e.g., decreased survivability or reproductive effects such as increased birthing intervals, which would directly affect productivity). Generally this is because immediate responses to vessel presence, such as avoidance behavior or changes in dive patterns, can be measured more easily than long-term effects. Further, interpretation of measured effects can be difficult. Studies on one species or group of animals (i.e., a feeding aggregation vs. a transiting aggregation vs. a breeding or calving aggregation) may not be applicable to another species or group.

The potential for vessels to cause disturbance to marine mammals is widely recognized. However, the literature on quantified impacts is not extensive. Baker and Herman (1989) note that "human disturbance has the potential to reduce an animal's biological fitness, defined as its relative reproductive contribution to subsequent generations, and thus inhibit the recovery of an endangered population." These authors conducted controlled studies on the impact of vessel traffic on humpback whales in Glacier Bay and in the Frederick Sound area of southeast Alaska. They examined responses to obtrusive, unobtrusive, and "pass by" conditions conducted by different vessel classes.

In this study, the obtrusive condition resulted in a striking increase in the frequency of blows when the whale was near the surface and an increase in the longest submergence observed (Baker and Herman 1989). Respiratory behaviors were the most sensitive indicators of response to a vessel. The effects declined as the activity of the vessel moderated during the unobtrusive and "pass by" conditions. The authors identified a 400 meter (m) range of influence within which vessel operations accounted for 27.5 percent of the variance in the blow intervals of whales.

Baker and Herman (1982, 1989) also noted a tendency of humpback whales to orient in the direction of the vessel as it approached, and then to turn away at a perpendicular direction as the vessel reached its closest point of approach. The percentage of whale movement devoted to avoidance behavior increased from 15 percent at a distance from the vessel of 4000 m to 27 percent at a distance from the vessel of 1000 m. Of note, however, is that predictable behavioral reactions to the

vessels were evident up to a distance of 4000 m from the vessel.

Baker and Herman (1989) also observed changes in aerial behavior and pod composition with the proximity and presence, respectively, of vessels. The presence of large vessels was correlated with changes in pod composition; aerial behavior occurred with a 50-percent probability when vessels approached within 478 m of the focal pod.

Despite changes in whale behavior occurring in response to vessel presence, the animals may not abandon the area in which the disturbance occurs. As Baker and Herman (1989) note, the availability of a rich food source may outweigh the disadvantages posed by the high level of vessel traffic and potential disturbances. This, however, does not preclude the possibility that an effect exists.

The dependence of humpback whales on the dense aggregations of prey may cause these whales to remain in an area to feed, despite potentially negative impacts from nearby vessels. The impact, therefore, could be one that occurs over time, reducing the overall fitness of the individual and manifested in reproductive or population level changes.

The range of vessel types that could interact with humpback whales in coastal Alaska includes the large commercial transport industry such as oil supertankers; tug and barge operations; ferries; fishing vessels; commercial tourism vessels including large cruise liners; wildlife viewing vessels; smaller owner-operator charter vessels that conduct multi-purpose tours; eco-tourism companies (specifically kayak-based tours); and private recreational vessels. However, vessels actively engaged in whale watching are the group of primary concern.

Although whale watching activities have been going on for some time in some areas of Alaska, the pressure has been at a level much lower than that which exists currently. Although not comprehensive, some data on the whale watch industry are available. Commercial Fisheries Entry Commission (CFEC) of the State of Alaska gathers data on charter vessels. These data represent the number of vessels in Alaska that register as charter fishing vessels. Some of the fishing charter fleet also offer whale watch charters; the CFEC statistic does not, however, include those vessels that conduct exclusively whale watching charters. In 1998, 3,670 vessels were registered as charter fishing vessels, an increase of 212 percent from 1988

(CFEC 1999). While this is not a direct measure of the universe of whale watching charters, the overlap between the charter fishing industry and the whale watching charter industry indicates that the number of charter vessels that could potentially interact with humpback whales is growing. This statistic also shows a significant increase in the charter industry over the last 10 years.

The U.S. Coast Guard state vessel registration program records all vessels under 5 net tons operating in Alaska waters. Data from 1999 indicate a total of 34,353 active vessels. This includes 2,171 commercial passenger vessels, 4,809 commercial fishing vessels, 660 rental vessels, 24,462 pleasure vessels and 1,226 in the "other" category. Some portion of the commercial passenger vessels are used for whale watching activities. Most of the remaining vessels could potentially interact with whales; the degree of interaction is likely to be minimal, except perhaps for pleasure craft whose operation can be directed at humpback whales. The majority of the 34,353 vessels, however, likely operate in coastal waters, overlapping to some extent with the range of the humpback whale. Although NMFS does not have information on specific vessel use patterns, the number of vessels that could interact with humpback whales has increased substantially in recent years and is likely to continue to grow.

The impact of the current level of viewing pressure, or an increased viewing pressure, may not be fully understood for many years. The risk of harm to the species from a possible delay in detecting a long-term negative response to increased pressure provides impetus to implement measures on a precautionary basis to manage vessel interaction with humpback whales in waters off Alaska.

#### Background to Proposed Regulations

The ESA and the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.* (MMPA), give NMFS jurisdiction over humpback whales. The proposed regulations are promulgated under the authority of both the ESA and the MMPA. The rule is an appropriate mechanism to promote conservation and recovery of humpback whales, and to enhance enforcement under the ESA. Section 11(f) of the ESA provides NMFS with broad rulemaking authority to enforce the provisions of the ESA.

For example, section 9(a) of the ESA prohibits the take of endangered marine mammals. Given that close approaches to humpback whales could harm, harass, injure or otherwise "take" one or more of this endangered species, the

proposed rule provides a safeguard against section 9(a) violations, and facilitates enforcement. In addition, Section 112(a) of the MMPA provides NMFS with broad authority to prescribe regulations that are necessary to carry out the purposes of the statute.

The MMPA contains a general prohibition on "taking" a marine mammal. "Take," under the MMPA, means to harass, hunt, capture, "collect" or kill any marine mammal, or attempt to do any of the above. Harassment is defined as any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild; or has the potential to disturb a marine mammal or marine mammal stock in the wild by causing a disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. The ESA generally prohibits the "taking" of an endangered species. The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The measure proposed in this rule is consistent with and is designed to implement the prohibition on "take" under both the ESA and the MMPA.

Beyond the prohibitions on "take" in the MMPA and the ESA, no protective regulations have been promulgated by NMFS in Alaska for humpback whales. Specific restrictions are implemented by the National Park Service for waters of Glacier Bay National Park and Preserve (36 CFR § 13.65). The restrictions within the boundaries of the Park include a minimum approach distance of 1/4 mile (440 yards or 0.4 km). Approaches to humpback whales within 200 nautical miles (370.4 km) of Hawaii may be no closer than 100 yards (91.4 m) (50 CFR § 224.103(a)). Approaches to North Atlantic right whales may be no closer than 500 yards (457 m) (50 CFR 224.103(b)).

In 1996, NMFS, Alaska Region, developed Marine Mammal Viewing Guidelines (Guidelines) designed to help people avoid "taking" a marine mammal and to provide protection to marine mammals subjected to viewing pressure. The Guidelines detailed appropriate viewing behavior from water-based platforms, including a 100 yard (91.4 m) minimum approach distance. Guidelines were also established for viewing from land and from aircraft. These Guidelines apply to all marine mammals in waters off Alaska (cetaceans and pinnipeds, except walrus) under the jurisdiction of NMFS. The Guidelines include minimum approach distances as well as general

operating procedures designed to reduce the potential impact to marine mammals. These proposed regulations would establish mandatory approach limits for humpback whales. The Guidelines would remain in effect for approaches to other marine mammals. The Guidelines would also continue to apply to other forms of conduct around humpback whales, such as suggested time limits on viewing individuals or groups of animals, and aircraft altitude.

The Guidelines have relied on voluntary compliance on the part of the public and the charter boat industry since implementation. Other than the ability to prosecute "takes" under the MMPA and the ESA, the Guidelines are not enforceable.

The viewing pressure has increased substantially over the last several years. The charter boat industry has grown in several key locations in southeast Alaska and in south central Alaska such that the potential impact to humpback whales is much greater than in earlier years.

In response to this recent increase in vessel traffic, NMFS, Alaska Region, expanded its public outreach effort. Public meetings were held in key coastal communities around the state to increase public awareness of and compliance with the Guidelines. The Guidelines brochures were also distributed through direct mailouts to affected parties, through various media, and at numerous public venues around the state. Meetings were also held with charter boat groups to discuss the Guidelines as well as to discuss remedies to non-compliance. However, after 3 years of an extensive campaign to promote the Marine Mammal Viewing Guidelines, non-compliance continues to occur. As public viewing increases, the potential for negative impacts to the animals increases. After careful evaluation of the overall marine mammal viewing situation in Alaska, NMFS has concluded that regulations are necessary to manage the threat to humpback whales caused by viewing pressure and to minimize the potential impact of increased human viewing pressure. Regulations are also necessary to provide an enforcement tool. Regulations are considered to be most critical for humpback whale watching because, as noted earlier, the nature of humpback whale distribution and feeding behaviors concentrates viewing pressure on individuals or groups of individuals over extended periods of time. The more transitory nature of other cetacean species may make them less vulnerable to potential negative impacts of marine mammal viewing activity.

The Alaska Region requested and received individual recommendations for specific protective measures from biologists, tour operators, members of the public and other interested parties. The recommendations included minimum approach distances ranging from 100 to 500 yards (91.4 to 457 m), speed limits around humpbacks, limits on time spent with an animal or group of animals, permitting, certification programs, and reductions in underwater noise levels.

#### **Description of Proposed Regulations**

Measures such as those described here might provide elements of protection for humpback whales exposed to vessel traffic; however many of these measures are also difficult to implement in an effective, practical, and enforceable way. Permitting and certification programs require a large infrastructure to implement as well as presenting equity issues in determining who is permitted/certified and who is not. Ambient noise in the underwater environment can often be fairly great, and measuring and regulating the relative contribution by certain vessel types would be difficult to do. Imposing noise reduction requirements on certain vessels could also require significant changes to a vessel's construction. Restricting vessel speed and time in an area or with a whale was considered problematic due to constraints that this measure could place on "non-target" vessels.

Restricting vessel speed and time in an area or with a whale was considered problematic at this time. There would need to be some relative aspect to speed limits such as a certain speed within defined geographic areas or within a certain area surrounding a whale. Implementing speed limits is difficult from an enforcement perspective.

Implementing speed limits within defined geographic areas could be unnecessarily restrictive and potentially dangerous in Alaska where some of the areas frequented by humpback whales, which involve narrow passageways with swift currents and large tidal fluctuations. Applying a slow speed limit to these areas could be hazardous for vessels. Placing speed limits within a certain area relative to the location of the whale (e.g., 5 kts within 300 yds) would be difficult for vessels to adhere to as the whales are constantly moving, which would require constant fine tuning for speed on the part of the vessel and potential greater disturbance to the whale with constant speed changes. Speed limits would also be difficult to enforce on a practical scale. Imposing time limits on a vessel staying

with a whale may also be difficult to enforce; particularly in determining what the point of reference is; i.e., an individual whale or group of whales and the burden of proving that it was the same individual or group, and group composition, that the vessel was staying with. Exempting certain types of non-motorized vessels from the 200 yard approach restriction was considered but is not proposed because of the risk that these types of vessels could surprise or startle a whale due to their size and silence.

NMFS is not proposing regulations for minimum altitude for aircraft in Alaska because of complications arising from the unique weather situation in Alaska. Inclement weather often forces pilots to fly at the minimum Federal Aviation Administration altitude, which may be lower than the recommendations in the Marine Mammal Viewing Guidelines.

Some of the preceding recommended measures may, however, be further considered in the future.

The primary objective of implementing regulations of this nature is to manage the threat to humpback whales caused by whale watching activities, and to minimize disturbance that could adversely affect the individual animal or the population. This should be balanced with the objective of allowing whale watching activities to occur. Whale watching activities can be good platforms for education about cetacean behavior and habitat concerns. NMFS believes that the most appropriate measure to minimize impacts to humpback whales that would also provide a satisfactory viewing opportunity is to implement a minimum approach distance for vessels operating around humpback whales.

NMFS, therefore, proposes to prohibit anyone from approaching, by any means including by interception (e.g., placing the vessel in the path of a humpback whale so that the whale surfaces within the buffer zone) within 200 yards (182.8 m) of a humpback whale in waters off Alaska. This measure is designed to manage the threat caused by vessels engaged in whale watching so that they do not encroach upon the whales and cause a disruption of normal activities and, thereby, implement the protections established by the ESA and the MMPA. This measure would also provide a greater enforcement ability. Including a prohibition on interception in these regulations adopts and codifies the NMFS' policy and practice with respect to enforcement of the Hawaii humpback whale regulations.

NMFS is also including two other measures that supplement the approach regulation. These measures are

contained in regulations concerning humpback whales in Hawaii and are considered applicable to Alaska. NMFS proposes to prohibit someone from causing a vessel or other object to approach within 200 yards (182.8 m) of a humpback whale and also from disrupting the normal behavior or prior activity of a whale by any other act or omission. The latter provision contains some of the elements currently expressed in recommended NMFS Marine Mammal Viewing Guidelines.

The Marine Mammal Viewing Guidelines recommend not approaching within 100 yards (91.4 m) of a marine mammal. NMFS believes that the 100 yard (91.4 m) recommendation in the guidelines is not enough to ensure minimal disturbance to humpback whales in Alaska.

NMFS considered several factors, as outlined here, in determining the 200-yard (182.8 m) minimum approach distance. Humpback whales return to the same localized areas during the summer months for intensive feeding in preparation for the return southward migration and a long period of fasting. Studies (Calambokidis, et al., 1997) of North Pacific humpback whales indicate that less interchange of animals from one site to another occurs in their feeding areas off Alaska than occurs in the Hawaiian subareas of their winter range. A greater degree of site fidelity in Alaska may make the animals more vulnerable to negative pressure. In Alaska, humpback whales may be less inclined to move to another site when disturbed, despite potentially negative impacts from vessel presence.

Many of these feeding areas in Southeast Alaska, in particular, are easily accessible from coastal communities that support large numbers of vessels. Dedicated whale watching operations have increased substantially in recent years and represent a constant daily presence around some groups of feeding humpback whales. This is the impetus to ensure that disturbance during feeding is minimized. Critical feeding activity may be interrupted by close approaches by vessels. Given the critical need of these animals to obtain the maximum amount of prey during a relatively short time period and their site fidelity, establishing a minimum approach distance that ensures only a minimum disturbance occurs during the summer feeding months is warranted.

In developing these proposed regulations, NMFS also solicited individual comments from the public and the whale watching industry. The greatest number of comments suggested speed limits around animals, followed by suggestions for minimum approach

distances. Some respondents, including industry respondents, suggested that the distance be increased from the distance in the Guidelines, up to 200 to 500 yards (182.8 to 457 m). Another significant factor taken into consideration was that Baker and Herman (1982, 1989) found that vessels can alter the behavior of humpback whales at distances ranging from 400 m (437.2 yards) to 4000 m (4372 yards) from a whale. Corkeron (1995) showed in Hervey Bay, Australia, that for non-calf and calf pods of humpback whales, the animals dove more often in the presence of vessels when the vessels were within 300 m of the animal. Although these studies did not evaluate vessel effects at lesser distances, it is reasonable to conclude that closer vessel approaches entail an equal or greater likelihood of altering an animal's behavior.

In addition to these considerations, NMFS conducted informal observations of vessel-whale interactions in southeast Alaska. Many of the viewing opportunities in southeast Alaska occur in tightly constrained areas where the local geography consists of many small islands with somewhat shallow and narrow passageways. Several vessels grouped at a distance of only 100 yards (91.4 m) from a whale may effectively deny a whale an apparent escape route, and also potentially restrict its movement during feeding. Finally, Glacier Bay National Park and Preserve (Park) regulations that prohibit vessel approaches closer than 1/4 mile (440 yards or 0.4 km) to humpback whales were considered.

Within the "buffer zone" (i.e., the area between vessels and whales, as established by NMFS guidelines or regulations), some degree of inadvertent encroachment will likely occur as vessels drift, maneuver around each other and whales, and as the whales move. This can create a situation in which the resulting distance between a vessel and a humpback whale is less than necessary. Extending the limits of this "buffer zone" to 200 yards (182.8 m) by regulation would allow for a greater effective distance from the whales while still allowing for good viewing opportunities.

Based on the factors described here, NMFS concluded that the minimum approach distance specified in the Alaska Guidelines is inadequate and should be increased, but not so far as to appreciably diminish the viewing experience. A distance of 200 yards (182.8 m) was determined to be the most appropriate to minimize negative impacts to humpback whales while still

allowing for good viewing opportunities.

The regulation would require that vessel operators ensure that, as they approach a humpback whale, they do not position the vessel closer than 200 yards (182.8 m) to the animal. NMFS recognizes that there are circumstances when a whale, under its own volition, might come within 200 yards (182.8 m) of a vessel. This might occur as a vessel idles at a specific site, is at anchor or is underway.

This prohibition is not designed to cause a vessel to retreat from the area when a whale approaches the vessel within the 200 yard (182.8 m) limit. However, a distinction is made between a vessel that is positioned to intercept the path of the whale such that the whale surfaces within the buffer area. The latter kind of maneuvering would be prohibited by the regulation. NMFS believes that requiring vessels to engage in avoidance maneuvers to reposition outside of 200 yards (182.8 m) in those instances when a whale approaches under its own volition would create greater potential for disturbance or physical impact than having the vessel remain in its original position. Thus, no avoidance measures are proposed.

All vessels would be prohibited from approaching within 200 yards (182.8 m) of a humpback whale.

The minimum approach distance proposed by NMFS would not supersede more conservative measures that apply to the designated waters of Glacier Bay National Park and Preserve.

### Classification

This proposed rule has been determined to be significant for purposes of Executive Order 12866.

NMFS has prepared a draft Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA), which is available from NMFS (see ADDRESSES). A summary of the analysis follows:

The analysis describes the reasons why the action is being considered and contains a succinct statement of the objectives of, and the legal basis for, the proposed rule. These are described earlier in this preamble.

The analysis contains a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply. The Small Business Administration establishes criteria for defining a "small entity" for purposes of the RFA. However there are no specific criteria for most of the industry sectors to which this proposed regulation would apply. Therefore, NMFS is applying conservative fishing

industry criteria of less than 100 employees (applicable to fishing businesses other than processors) and less than \$3M gross revenues as a threshold measure for definition of "small entities." NMFS does not have access to information on the number of employees and the gross revenues of the affected industry sectors. As a result, qualitative judgements are made about whether the various affected industry sectors are "small entities" or not. Those industry sectors likely to be "small entities" are owner-operator whale watch businesses, the primary focus of the regulation, and eco-tourism companies (in this case mostly local kayak tour businesses), as well as some owner-operator fishing enterprises. Other industry sectors such as the large maritime transport industry, the large cruise line industry and most tug and barge operations are not likely to be "small entities." The only governmental jurisdiction (included because of the operation of the state ferry system) to which this regulation would apply is the State of Alaska, which, having greater than 50,000 residents, would not be considered a small governmental jurisdiction.

This proposed rule does not contain any reporting or record keeping requirements. This proposed rule does not duplicate, overlap or conflict with any other relevant Federal rules. The National Park Service (NPS) promulgated regulations at 36 CFR 13.65 that establish approach rules for humpback whales in Glacier Bay National Park and Preserve, Alaska. The NPS regulations set minimum approach distances to humpback whales of 1/4 mile within waters of Glacier Bay National Park and Preserve. These regulations are more restrictive than the rule proposed by NMFS. This proposed rule specifically provides that it will "not take precedence over any more restrictive conflicting Federal regulation pertaining to humpback whales, including the regulations at 36 CFR 13.65 that pertain specifically to the waters of Glacier Bay National Park and Preserve.

This proposed rule reflects the preferred method of restricting approaches to humpback whales in Alaska. In addition to the proposed rule, five alternatives were evaluated:

Alternative 1. Maintain the status quo. The Marine Mammal Viewing Guidelines (Guidelines) developed by NMFS Alaska Region in 1996, include minimum approach distances as well as general operating procedures designed to reduce the potential impact vessels on marine mammals. However, several issues make the current situation

ineffective in preventing disturbance, as described earlier in this preamble: (1) "take" provisions of the MMPA and ESA may be difficult for the public to interpret and, therefore, abide by; (2) "take" prohibition is difficult to enforce; and (3) because the Guidelines are not codified as law, they must be adhered to on a voluntary basis for them to be effective. Reports received by the NMFS, Alaska Region, indicate that the Guidelines are not adhered to on a consistent basis. Viewing pressure, particularly from dedicated whale watch operations and recreational boaters, has increased in recent years and is likely to continue to increase.

*Alternative 2. Limit approaches to a humpback whale to a minimum distance from the whale.* Two options available under this alternative include: (1) prohibit approaches by any means, including by interception within 100 yards (91.4 m) of a humpback whale in waters off Alaska; and (2) Prohibit approaches by any means, including by interception within 200 yards (182.8 m) of a humpback whale in waters off Alaska (Preferred Alternative).

Based on factors described earlier in this preamble, NMFS has concluded that the 100 yard (91.4 m) minimum approach distance currently specified in the Alaska Guidelines is inadequate, and that 200 yards (182.8 m) is the most appropriate distance to minimize negative impacts to humpback whales in Alaska, while still allowing for good viewing opportunities. The critical need of the whales to obtain the maximum amount of prey during a relative short time period and their site fidelity may make the animals more vulnerable to negative pressure from vessels.

Further, the potential exists for behavior changes by animals in the presence of vessels. Studies have shown alterations in behavior of humpback whales caused by vessels within the 400 m to 4000 m range. Although these studies did not evaluate vessel effects at distances of less than that, it stands to reason that closer vessel approaches entail an equal or greater likelihood of altering an animal's behavior.

Finally, informal observations by NMFS of vessel-whale interactions in southeast Alaska indicate that many of the viewing opportunities in southeast Alaska occur in tightly constrained areas where the local geography consists of many small islands, at a distance of only 100 yards (91.4 m) for a whale, may often not leave the whale with an apparent escape route, and also potentially restrict its movement during feeding.

*Alternative 3. Establish protective measures other than approach*

*distances.* Other potentially protective measures considered by NMFS for humpback whales in Alaska waters include: speed limits, limits on time spent with an animal(s), permitting or certification programs, and reduction in underwater noise. While these measures could provide a degree of protection for humpback whales exposed to vessel traffic, most are difficult to implement and/or monitor in an effective, practical and enforceable way. Permitting and certification programs require a large infrastructure to implement and involve equity issues in determining who is permitted/certified and who is not. Measuring and regulating the relative contribution by certain vessel types would be difficult, as would imposing noise reduction requirements on vessels. Implementing vessel speed limits could be unnecessarily restrictive and potentially dangerous in Alaska where some of the areas frequented by humpback whales are narrow passageways with swift currents and large tidal fluctuations, and could also be difficult to enforce on a practical scale. Imposing time limits on whale watch vessels could also be difficult to enforce.

*Alternative 4. Prohibit approaches to humpback whales within a certain distance but exempt certain vessel types (e.g., kayaks or non-motorized vessels.* The intuitive reasoning for exempting kayaks and other non-motorized vessels from approach regulations is that they are less likely to cause a disturbance or negative impact to humpback whales. However, because of their size, maneuverability, and silence, such vessels can be more likely to surprise or startle a whale(s). This may be particularly true when humpback whales are intensively feeding and are using noise cues to detect objects at the surface. NMFS, Alaska Region, has received, and continues to receive complaints of kayaks disturbing whales. Implementing this alternative would also create an inequitable situation among boat operators. *Alternative 5. Establish certain vessel limits within varying distances of a humpback whale.* For example, different limits on the number of vessels that may be within 100 yards, 200 yards, etc., of a humpback whale. This alternative may be effective at minimizing pressure on humpback whales by dispersing the vessels over greater distances. However, a spatial arrangement would inadvertently establish prime and exclusive viewing for the vessels that are closest, thereby possibly placing some businesses at a competitive disadvantage. One way of alleviating

such competition, would be to establish time limits within the various viewing circles to avoid the establishment of exclusive viewing areas closest to the whales. However, time limits would be very difficult to implement, monitor, and enforce.

The President has directed Federal agencies to use plain language in their communications with the public, including regulations. To comply with that directive, NMFS seeks public comment on any ambiguity or unnecessary complexity arising from the language used in this proposed rule.

#### List of Subjects in 50 CFR Part 224

Endangered and threatened species, Exports, Imports, Transportation.

For the reasons set out in the preamble, 50 CFR part 224 is proposed to be amended as follows:

#### PART 224 ENDANGERED MARINE AND ANADROMOUS SPECIES

1. 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.*

2. In § 224.103, paragraph (a) is revised to read as follows:

##### § 224.103 Special prohibitions for endangered marine mammals.

(a) *Approaching humpback whales—*  
(1) *Hawaii.* Except as provided part 222, subpart C of this chapter (General permit Procedures), it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, or cause to be committed, within 200 nautical miles (370.4 km) of the Islands of Hawaii, any of the following acts with respect to humpback whales (*Megaptera novaeangliae*):

(i) Operate any aircraft within 1,000 feet (304.8 m) of any humpback whale;

(ii) Approach, by any means within 100 yards (91.4 m) of any humpback whale;

(iii) Cause a vessel or other object to approach within 100 yards (91.4 m) of a humpback whale; or

(iv) Disrupt the normal behavior or prior activity of a whale by any other act or omission. A disruption of normal behavior may be manifested by, among other actions on the part of the whale, a rapid change in direction or speed; escape tactics such as prolonged diving, underwater course changes, underwater exhalation, or evasive swimming patterns; interruptions of breeding, nursing, or resting activities; attempts by a whale to shield a calf from a vessel or human observer by tail swishing or by other protective movement; or the abandonment of a previously frequented area.

(2) *Alaska.* Except as provided in part 222, subpart C of this chapter (General Permit Procedures), it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, within 200 nautical miles (370.4 km) of Alaska, any of the acts in paragraphs (a)(2)(i) through (iii) of this section with respect to humpback whales (*Megaptera novaeangliae*):

(i) Approach, by any means, including by interception, within 200 yards (182.8 m) of any humpback whale;

(ii) Cause a vessel or other object to approach within 200 yards (182.8 m) of a humpback whale; or

(iii) Disrupt the normal behavior or prior activity of a whale by any other act or omission, as described in paragraph (a)(1)(iv) of this section.

(iv) These regulations shall not take precedence over any more restrictive conflicting Federal regulation pertaining to humpback whales, including the regulations at 36 CFR 13.65 that pertain specifically to the waters of Glacier Bay National Park and Preserve.

\* \* \* \* \*

Dated: June 19, 2000.

**Penelope D. Dalton,**

*Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*

[FR Doc. 00–16113 Filed 6–23–00; 8:45 am]

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#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

##### 50 CFR Parts 300 and 679

[Docket No. 000616184–0184–01; I.D. 050500A]

**RIN 0648–AK74**

##### Fisheries of the Exclusive Economic Zone Off Alaska; Prohibition of Groundfish Fishing and Anchoring in the Sitka Pinnacles Marine Reserve

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations to implement Amendment 59 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP), and to make changes to the regulations governing the halibut fishery. This action would designate a 2.5 square nautical mile (nm) area of Federal ocean

water above and surrounding the Pinnacles off Cape Edgecumbe in the Gulf of Alaska (GOA) as the Sitka Pinnacles Marine Reserve. This area, which is an unusually productive and highly fragile marine habitat, would be closed to fishing for groundfish or anchoring by vessels holding a Federal fisheries permit. The area would also be closed to commercial or sport fishing for Pacific halibut, and to anchoring by sport or commercial halibut vessels. The intent of this action is to protect an area containing important fish habitat from degradation due to fishing and anchoring impacts, and to create a groundfish reserve.

**DATES:** Comments on the proposed rule must be received by August 10, 2000.

**ADDRESSES:** Comments must be sent to Susan Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Lori Gravel. Comments may also be sent via facsimile (fax) to 907–586–7465. Comments will not be accepted if submitted via e-mail or Internet. Courier or hand delivery of comments may be made to NMFS in the Federal Building, Room 453, Juneau, AK. Copies of Amendment 59 and the Environmental Assessment/Regulatory Impact Review/Initial Flexibility Analysis (EA/RIR/IRFA) prepared for the amendment by the North Pacific Fishery Management Council (Council) and NMFS are available from the Council, 605 West 4<sup>th</sup> Avenue, Suite 306, Anchorage, AK 99501–2252; telephone 907–271–2809.

**FOR FURTHER INFORMATION CONTACT:** Nina Mollett, 907–586–7462, fax 907–586–7465, e-mail [nina.mollett@noaa.gov](mailto:nina.mollett@noaa.gov).

##### SUPPLEMENTARY INFORMATION:

Regulations governing the domestic groundfish fisheries appear at 50 CFR parts 600 and 679. Regulations governing the domestic halibut fisheries appear at 50 CFR 300.60 to 300.65. These regulations supplement the annual fishery management measures adopted by the International Pacific Halibut Commission (IPHC) under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea.

The Council has submitted Amendment 59 to the Secretary of Commerce (Secretary) for review. NMFS published a notice of availability (NOA) of the FMP amendment on May 12, 2000 (65 FR 30559), with comments on the FMP amendment invited through July 11, 2000. Written comments may address the FMP amendment, the proposed rule, or both, but must be