



MARINE MAMMAL COMMISSION

10 September 2013

Ms. Mary Colligan
Assistant Regional Administrator for Protected Resources
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 09130
Attn: Harbor Porpoise Proposed rule

Dear Ms. Colligan:

The Marine Mammal Commission (MMC), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the proposed rule published by the National Marine Fisheries Service (NMFS) to amend the Harbor Porpoise Take Reduction Plan (78 Fed. Reg. 52753) and the accompanying draft environmental assessment. NMFS proposes to eliminate consequence closure provisions of the existing rule that are implemented when harbor porpoise bycatch in gillnet sets off New England and mid-Atlantic coastal states exceeds statutory take reduction goals (i.e., when serious injuries and mortality exceed potential biological removal levels). The MMC offers the following comments and recommendations.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service—

- not eliminate the consequence closure strategy;
- retain the existing consequence closure areas;
- replace the current bycatch-rate trigger for consequence closure areas with a new PBR-based trigger that establishes bycatch levels that decline over no more than five years toward the ZMRG;
- implement the measures required to generate the required bycatch estimates;
- commit to reconvening the Team for advice on actions needed to implement consequence measures;
- base consequence measures on the distribution and levels of bycatch in the Gulf of Maine and Southern New England, and off the mid-Atlantic states;
- continue discussions concerning additional measures to address bycatch in the mid-Atlantic region;
- correct the record regarding the statements about the meeting, particularly the statement that “a majority of the Team recommended eliminating the current consequence closure strategy,” and note instead that (1) the Team was unable to agree on an alternative consequence closure strategy in the time allotted and (2) NMFS therefore decided to propose eliminating the current consequence closure provisions entirely, even though there

was not broad support for such an action by the majority of the sectors represented on the Take Reduction Team; and

- extend the comment period on the proposed rule for an additional 45 days.

RATIONALE

The Harbor Porpoise Take Reduction Plan was first implemented in 1998 based on recommendations by the Harbor Porpoise Take Reduction Team (hereafter referred to as the “Team”). Under the Marine Mammal Protection Act (MMPA) the immediate goal of such plans is to reduce serious injuries and mortality to levels below the stock’s potential biological removal (PBR) level within six months of a plan’s implementation and to insignificant levels approaching a zero mortality and serious injury rate within five years of plan implementation. This so-called zero mortality rate goal (ZMRG), has been defined by NMFS as ten percent of PBR. Although the harbor porpoise bycatch level declined to below PBR and even approached ZMRG by the early 2000s, the level subsequently rose above PBR due to poor compliance with plan provisions (e.g., mandated use of pingers and gear modifications), and a shift in fishing patterns away from identified management areas. NMFS therefore reconvened the Team and, based on recommendations developed at Team meetings in late 2007 and early 2008, adopted a new plan in February 2010 (75 Fed. Reg. 7383). Part of that revised plan established three “consequence closure areas” (two off southern New England and one in the Gulf of Maine) and specified area-specific triggers for closing them if take reduction goals were not met.

The Commission notes that consequence closures were recommended by the Team at its 2007 and 2008 meetings for two reasons: (1) to encourage compliance with other take reduction plan requirements (i.e., using pingers in New England and specified gear modifications off mid-Atlantic coastal states) by imposing consequences for continued non-compliance that resulted in not meeting plan objectives; and (2) to enable rapid implementation of additional measures when needed to achieve plan goals, without the delays associated with undertaking a new rulemaking. As explained in the current notice, “[it] was anticipated that the consequence closures would further reduce harbor porpoise mortalities by virtue of the times and areas chosen for their implementation in areas with poor pinger compliance.”

The consequence closure provisions require the closure of designated areas if the bycatch rate (porpoise takes/ton of fish landed) exceeds set values for two consecutive fishing seasons. The bycatch rate was used as a proxy for total bycatch, which takes longer to estimate. The choice of this proxy was based on an assumed relationship between the bycatch rate and estimated bycatch levels.

The notice states that at a May 2013 Team meeting “a majority of the team recommended eliminating the current consequence strategy” that was adopted as part of the 2010 rule, and as a result NMFS is proposing to do so. As discussed below, NMFS has mischaracterized the results of the Team’s deliberations (as summarized in the key outcomes memo from the meeting), is backing away, without sufficient justification, from measures designed to ensure that bycatch is reduced to below PBR, and has not abided by the consensus-based procedures under which take reduction teams prepare draft plans. Further, because the justification for the consequence closure strategy in the 2010 rule still exists, the MMC believes NMFS should not eliminate those provisions entirely, but rather, should consider possible modifications.

Proposed Elimination of Consequence Closures

NMFS proposes to amend the Harbor Porpoise Take Reduction Plan by eliminating the current consequence closure provisions. The MMC agrees that the current triggers for these closures may be inappropriate and in need of change. However, the MMC strongly opposes eliminating the consequence closure strategy entirely. The reasons for adopting the strategy are as relevant now as they were in 2007 given that take reduction plan goals have yet to be met. Noncompliance with pinger and other gear requirements remains an important problem and, despite recent decreases in total bycatch, it is still considerably above ZMRG. As noted in deliberations at the Team's May 2013 meeting, and as documented in the key outcomes memo from that meeting, two fundamental problems exist with respect to the current closure provisions—(1) bycatch rates used to trigger the closures are not a useful proxy for total bycatch levels, as was initially thought; and (2) there is no consequence measure for reducing excessive bycatch in the mid-Atlantic region.

With regard to the use of bycatch rate as a proxy for total bycatch level, NMFS indicated in the notice that bycatch rates were exceeded by fisheries in the Gulf of Maine for two successive years (2011 and 2012) after implementation of the new rule. This triggered what ultimately became a winter 2013 Gulf of Maine closure, which will again go into effect this October. Two similar closures of the Cape Cod South Expansion and Eastern Cape Cod Closure Areas will start on February 1, 2014, on the basis of the target bycatch rates having been exceeded for these areas. However, the relationship between bycatch rate and the estimated total bycatch was not as expected, most likely as a result of declining fish landings over the period. The total bycatch estimated for the 2011 fishing year was just 446 porpoises, well below the PBR level of 706 porpoises per year, and a preliminary estimate of the 2012 bycatch is even lower (249 porpoises). The Team therefore concluded at its May 2013 meeting that the use of bycatch rates was not appropriate for purposes of triggering a consequence closure and agreed that a PBR-based metric was more appropriate.

The Commission believes that consequence closures are still needed to help ensure that the goals of the take reduction plan are achieved; consequence closures should not be abandoned merely because of problems with the selected trigger. At the May 2013 meeting, Team members suggested, and there was broad agreement, that the bycatch rate metric could be replaced by estimates of overall bycatch. Specifically, preliminary estimates of overall bycatch for the preceding fishing year (such as those provided in the Notice for 2009 to 2012) could be made available each year in May or June to inform actions for the coming year.

Success in reducing bycatch to below PBR levels for harbor porpoises is not a sufficient reason to discard consequence closures. Achieving such reductions is only an initial goal. As recognized by the Team at its May 2013 meeting, the ultimate goal of any proposed measure must be to achieve the ZMRG (i.e., to reduce porpoise bycatch to 10 percent of PBR) within five years. To move the fishery toward the ZMRG, the Team reached broad agreement that a PBR-based trigger should include a sliding scale of bycatch reduction (e.g., set at PBR in year one and decreasing linearly to 10 percent of PBR by year five). This plan, which is described in Attachment 2 of the summary of the May 2013 Team meeting¹, would provide incentives for increasing compliance and meeting the ZMRG. With regard to future closures, the Team proposed that a sliding-scale trigger could be associated with shorter closure periods as ZMRG is approached. The MMC fully agrees

¹ http://www.nero.noaa.gov/protected/porptrp/trt/Meetings/2013day1may/final_kom_hptrt_may_2013.pdf

with that approach. While the Team acknowledged that time-area closures have weaknesses, there was broad agreement among the sectors represented on the Team, including fishery representatives, that the existing consequence closure boundaries and time frames were appropriate.

The Team devoted considerable time at the May 2013 meeting to developing an approach that would retain the consequence closures, but replace bycatch rate with a PBR-based trigger that would decrease in a stepwise fashion toward ZMRG. Despite considerable progress the team was unable to reach a consensus on a single approach by the end of the meeting.

Some Team members noted that a major shortcoming of the current plan is that there is no consequence measure for the mid-Atlantic region. Many members of the Team were concerned that if bycatch levels in the mid-Atlantic region increase or become a major reason for not progressing toward the ZMRG, it could trigger consequence closures in New England that would affect fishermen in that area rather than those in the Mid-Atlantic who prompted, or at least contributed to, the closures. The Team discussed measures to address this situation, but unanimous agreement was not reached. Given the concerns of the team, this is not a reason to abandon the idea of adopting consequence measures in the mid-Atlantic when bycatch in that area reaches a certain threshold.

The MMC maintains that if NMFS were to eliminate the consequence closure strategy entirely, it would lose an essential tool for ensuring that bycatch levels remain below PBR and ultimately meet the ZMRG. In addition to providing an incentive for compliance with pinger and gear modification requirements, the strategy identifies needed actions to respond to situations when other measures fail to achieve the required reductions in marine mammal bycatch. As mentioned previously, a major purpose of this strategy was to allow prompt implementation of additional measures without further rulemaking when plan goals are not being achieved with existing measures. With its proposal to eliminate the consequence closure strategy, NMFS would have to reconvene the Team for a new round of meetings, develop a new rule and associated documents, and complete a new rulemaking if the amended regulations fail to achieve the MMPA's take reduction goals. This process, which took four years to complete in the last round, would result in a delay of several years before new take reduction measures could be implemented, during which time bycatch in excess of required limits would continue unaddressed. Moreover, NMFS could risk litigation if the new plan fails to meet the take reduction mandates of the MMPA, in which case an adverse ruling would likely result in measures much stricter than the consequence closures. To maintain and build on the effectiveness of the existing plan and meet the MMPA requirements, the MMC recommends retaining the consequence closure strategy, with modifications patterned on those discussed by the Team and in this letter.

Therefore, the MMC recommends that NMFS (1) not eliminate the consequence closure strategy; (2) retain the existing consequence closure areas; (3) replace the current bycatch-rate trigger for consequence closure areas with a new PBR-based trigger that establishes bycatch levels that decline over no more than five years toward the ZMRG (e.g., as proposed in Attachment 2 to the key outcomes memorandum from the Harbor Porpoise Take Reduction Team's May 2013 meeting); (4) implement the measures required to generate the required bycatch estimates; and (5) commit to reconvening the Team for advice on actions needed to implement consequence measures (e.g., which consequence areas to close, over what time frames, other requirements). The Commission further recommends that consequence measures be based on the distribution and levels of bycatch

in the Gulf of Maine and Southern New England and off the mid-Atlantic states – and that NMFS continue discussions concerning additional measures to address bycatch in the mid-Atlantic region.

Take Reduction Team Advice

The preamble to the proposed rule states that during the May 2013 meeting of the Gulf of Maine Harbor Porpoise Take Reduction Team “...a majority of the Team recommended eliminating the current consequence closure strategy from the Plan and continuing Team discussions on what other actions should be taken in lieu of the consequence closure to ensure compliance with the pinger requirements.” The MMC believes this statement mischaracterizes the Team’s deliberations. Based on the Key Outcomes Memorandum and observations by the MMC’s representative who participated in that meeting, the MMC does not agree that a majority of the Team recommended eliminating the consequence closure provisions. Such a recommendation was proposed orally by NMFS staff very near the end of the meeting after it had become clear that the Team would be unable to reach consensus at that meeting on an alternative set of measures. As noted in the Key Outcomes Memorandum, several members had left at that point, leaving only one representative from the science community and none from the conservation community. Those members still present were asked if they supported the idea of eliminating the consequence closures if some additional measures were taken, but the full Team had no opportunity to consider a detailed description of the NMFS proposal and there was virtually no time to discuss any of the details or implications of the agency’s last-minute proposal.

The take reduction team process was established to reach agreements that balance the views of all stakeholders, including fishermen, conservation groups, scientists, and involved agencies. The MMPA states that the membership of a take reduction team “shall, to the maximum extent practicable, consist of an equitable balance among representatives of resource user interests and non-user interests.”² Further, the MMPA requires that draft take reduction plans “shall be developed by consensus (and) in the event consensus cannot be reached the team shall advise the Secretary in writing on the range of possibilities considered by the team.”³ In keeping with these requirements, the MMC considers that, to the extent possible, measures adopted by the Service should be based on the prospective measures considered by the full team or, at a minimum, a balanced subset of team members. That is not the case in this instance.

When consensus is not reached on particular measures in a take reduction team, it is inappropriate to suggest that a “majority” of the team supports a measure unless that support reflects a majority of all sectors represented, including fishermen, conservation groups, scientists, and involved government agencies. Without the required balance, “majority” views may not reflect the balance of views between the interests of resource users and nonusers called for under section 118, but merely skewed representation among those groups. In this regard, the MMC objects to language in the current proposed rule and other notices on take reduction plan actions prepared by NMFS’s Northeast Regional Office, in which the agency repeatedly mischaracterizes team positions by referencing “majority” views that are based on simple head-counting, rather than providing the range of views expressed (and thus following the spirit of the MMPA language quoted above).

² MMPA section 118(f)(6)(C), 16 U.S.C. § 1387(f)(6)(C).

³ MMPA section 118(f)(7)(A)(ii), 16 U.S.C. § 1387(f)(7)(A)(ii).

The MMC has several other concerns with the take reduction team process and how it has been reported and reflected in the proposed rule. Most of the Team's May 2013 meeting was spent discussing elements of a modified consequence closure approach that are not fully reported in the notice. Also, it is inappropriate for NMFS to discuss in the Notice only the elements of, and views on, its last-minute oral proposal but not the elements of the alternative proposals considered by the Team to modify the consequence closure strategy, which was the primary focus of the May 2013 meeting. A more accurate summary of the meeting would include reference to the alternatives that garnered greater support from all segments of the Team than the alternative reflected in the proposed rule. The MMC recommends that NMFS correct the record regarding the statements about the meeting, particularly the statement that "a majority of the Team recommended eliminating the current consequence closure strategy," and note instead that (1) the Team was unable to agree on an alternative consequence closure strategy in the time allotted; and (2) NMFS therefore decided to propose eliminating the current consequence closure provisions entirely, even though there was not broad support for such an action by the majority of the sectors represented on the Take Reduction Team.

Adequacy of Comment Period

The MMC was surprised to see that only a 15-day comment period is being provided on the proposed rule. Recognizing that this includes weekends and the Labor Day holiday, this amounts to a comment period of only 10 business days. NMFS nowhere provides any rationale explaining the need for such expedited procedures.

Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, specifies that general notice of a proposed rule shall be published in the *Federal Register* and that interested persons shall be given an opportunity to participate in the rulemaking through the submission of data, views, or arguments. The Act does not specify a minimum public comment period for a proposed rule, but federal courts have generally found that comment periods should be of sufficient duration to allow for meaningful review and input. Periods of less than 30 days often are viewed as being inadequate.

Executive Order 12866 provides guidance concerning regulatory planning and review. Section 6(a) of that order, which sets forth agency responsibilities, specifies that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." While this directive is not couched in mandatory terms, it nevertheless provides an expectation against which shorter comment periods should be assessed.

President Obama reiterated this guidance in Executive Order 13563. That order directed that "[r]egulations be adopted through a process that involves public participation." Toward that end, the order specified that, "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days." Nothing in the proposed rule suggests that providing a longer comment period in this instance is either infeasible or contrary to any legal obligation of NMFS.

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The Administrative Procedure Act includes a “good cause” exception (5 U.S.C. § 553(b)(3)(B)) that may warrant a shorter comment period, or even waiving it entirely, in certain instances. However, such instances are to be construed narrowly (e.g., when immediate action is necessary to reduce or avoid health hazards or imminent harm to persons or property). In addition, the agency must explain in its rule the basis for any finding that the notice and comment procedures are “impracticable, unnecessary, or contrary to the public interest.” The proposed rule provides no rationale for shortening the comment period in this instance. Consistent with the applicable executive orders, the MMC recommends that NMFS extend the comment period on the proposed rule for an additional 45 days.

Thank you for considering the above comments and recommendations. If you have any questions regarding these comments, please don’t hesitate to contact me.

Sincerely,



Rebecca Lent, Ph.D.
Executive Director