

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

1 July 2008

Ms. Mary Colligan
Assistant Regional Administrator for Protected Resources
Northeast Region, National Marine Fisheries Service
1 Blackburn Drive
Gloucester, MA 01930

Dear Ms. Colligan:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's proposed regulations published in the 6 June 2008 *Federal Register* to amend the Atlantic Large Whale Take Reduction Plan. The Service proposes to delete references to the term "neutrally buoyant line" and to delay implementation of a requirement for trap and pot fisheries to use sinking groundlines. Based on its review, the Commission offers the following recommendations and comments.

RECOMMENDATIONS

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

- adopt the proposed revisions to delete references to, and the definition of, "neutrally buoyant line" in lieu of the term "sinking line, and
- withdraw the proposal to defer until 5 April 2009 the effective date requiring the use of sinking groundlines and retain the current implementation date of 5 October 2008.

RATIONALE

The Commission's recommendations pertain to the definition for sinking groundline and the date after which such line will be required for pot and trap fisheries.

Defining "Sinking" Groundline

The *Federal Register* describes proposed changes that would delete the term "neutrally buoyant line" from the regulations implementing the Atlantic Large Whale Take Reduction Plan (ALWTRP). Fishermen are now required to use either "neutrally buoyant line" or "sinking line" as groundlines on commercial traps and pots fished along the U.S. East Coast. The current regulations define both terms identically (i.e., line with a specific gravity of 1.03 or greater). According to the Service, the use of two terms with the same definition has led to confusion, and it has therefore determined that a single term ("sinking line") should be used. Given that the proposed change would not alter existing requirements and could reduce confusion, the Marine Mammal Commission recommends that the Service adopt the proposed revisions to delete references to, and the definition of, "neutrally buoyant line" in lieu of the term "sinking line."

Delaying the Implementation Date for Requiring the Use of Sinking Groundline

Large whales along the U.S. Atlantic coast, including North Atlantic right whales, become entangled and can be seriously injured or killed in two components of fishing traps and pots: vertical lines that link bottom fishing gear with surface buoys and floating groundlines that connect strings of traps on the seafloor. Gear modifications implemented under previous ALWTRP provisions to reduce the risk of whale entanglement were found to be inadequate in 2003 when it became apparent that right whales were still being entangled and killed in approved fishing gear. To improve the effectiveness of such entanglement prevention measures, the Service initiated efforts in 2003 to revise the plan, and it adopted final revised rules on 5 October 2007. The principal feature of the revised plan is a broad-based measure to reduce groundline entanglements by requiring trap and pot fisheries to replace all floating lines with sinking lines. Doing so should reduce the amount of line in the water column, thereby reducing the risk of entangling whales. The effective date for this measure was deferred until 5 October 2008 to allow fishermen time to replace their lines.

Despite the urgent need to reduce entanglement risks, the Service required more than two years to publish its proposed plan revisions on 25 June 2005 and more than two additional years to adopt final rules in October 2007. It has now been more than five years since the previous plan was found to be inadequate and, because of the deferred implementation date, the principal provision for reducing entanglement risks has yet to take effect. Available records show that at least 18 additional right whale entanglements have been observed during those five years. Based on their last sightings, at least half of those animals are either still entangled or are dead.

The Service is now proposing to defer implementation of the sinking groundline requirement for an additional six months to 5 April 2009. In its *Federal Register* notice, the Service states that it has concluded that such a delay would have a minimal impact on whales and cites five reasons to support that conclusion. As explained below, the Marine Mammal Commission finds the Service's justification for its conclusion to be inadequate and the proposed deferral contrary to protection needs for North Atlantic right whales.

First, the notice states that "the majority of the conservation measures included in the (5 October 2007) amendment to the ALWTRP would already be in place." This statement fails to recognize the primary importance of the sinking groundline requirement relative to other measures in the revised plan. The groundline requirement is the only measure in the revised plan that would significantly reduce the amount of line in the water column and is therefore the only measure with a probability of further reducing entanglement risks. Most of the other measures in the revised plan address vertical lines in ways that were already required under the previous plan and are broadly recognized by the Service and others as being inadequate to prevent vertical line entanglements. This recognition is illustrated by the fact that, at the past two meetings of the Atlantic Large Whale Take Reduction Team, the Service has underscored the need for new measures to prevent entanglements in vertical lines and dedicated most of those meetings to that subject. Given the failure of the current plan to prevent entanglements in vertical lines and past analyses concluding that sinking groundline requirements should be implemented by 5 October 2008 (e.g., the environmental impact statement supporting the 12 February 2007 final rules), we find it entirely inconsistent for the

Ms. Mary Colligan
1 July 2008
Page 3

Service to now suggest that a further six-month delay in sinking groundline requirements would pose a minimal risk to right whales. Moreover, there appears to have been no consideration given to the fact that at least 5 percent of the entire right whale population (e.g., 18 of 350 whales) has been entangled in fishing gear during the time it has taken to develop the new rules.

Second, the notice states that the impact on large whales will be minimal because “special right whale management areas have already converted to sinking groundline.” Most of the special areas specified in this plan were already in place under the previous plan, which was found to be inadequate. Thus, by themselves, these areas provide little assurance of protection beyond that which was provided in the previous plan. Moreover, the revised plan adopted in October 2007 eliminated provisions for dynamic management areas in lieu of the 5 October 2008 sinking groundline measures. That measure required use of sinking groundlines in areas outside the seasonal or special management areas. Thus, until the sinking groundline requirement takes effect, the amount of time and area in which sinking groundlines would be required will actually be less than that which was required prior to adoption of the October 2007 revised rules. This could result in some fishermen reverting to the use of floating line in the absence of previous requirements to use sinking line in certain areas. Accordingly, we fail to see how this situation justifies the Service’s conclusion that deferral poses a minimal risk.

Third, the Service states that the impact on large whales will be minimal because “most trap trap/pot gear is out of the water during a portion of the time period before the broad-based sinking groundline requirements go into effect” (i.e., 5 April 2009). The notice provides no information to justify the statement, and we are aware of no analyses evaluating when, where, or how much trap or pot gear is removed from the water between October and April. Moreover, there appears to be no evaluation as to whether the gear that is not removed is located in areas where right whales are likely to encounter it. Available information does, however, clearly indicate that right whales do become entangled during the proposed six-month deferral period. For example, a juvenile right whale (#3530) observed in the Gulf of Maine with no injuries on 19 December 2007 was subsequently seen with extensive entanglement scars off Florida on 29 January 2008. Similarly, an adult female right whale (#2645) observed gear-free on 13 September 2007 in the Bay of Fundy was seen entangled on 12 January 2008. Thus, even if most trap and pot gear is removed from the water during the six-month period that sinking groundline requirements would be deferred, right whales have and are likely to continue to become entangled during this period unless further steps are taken to reduce such risks.

Fourth, the notice suggests that the impact on large whales will be minimal because “the primary seasonal distribution of large whales in the Northeast occurs before the proposed effective date ... (where the majority of confusion has been reported to have occurred)” (parenthetical clause is part of the cited text apparently referencing confusion among fisheries as to the type of line to purchase). This statement makes little sense. Right whales are the principal species of concern in this plan, and their largest concentrations in the Northeast occur in late summer in the Bay of Fundy (i.e., after the proposed 5 April implementation date) and in spring in Cape Cod Bay and the Great South Channel (i.e., before the proposed 5 April implementation date). Moreover, the statement appears to disregard the fact that the winter distribution is not known for most right whales and that

Ms. Mary Colligan
1 July 2008
Page 4

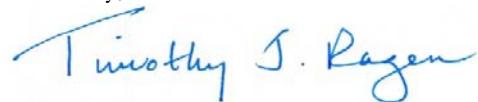
recent sightings in the central Gulf of Maine indicate that this area is a significant overwintering area. The statement also suggests that most confusion regarding which types of line to purchase has been in the Northeast (presumably Maine). No information is provided to evaluate the extent of this confusion or whether it is based on terminology in the October 2007 regulations. Given extensive outreach efforts, delays in implementing requirements, and extensive public comment by affected fisheries on the sinking groundline requirement, we find it highly unlikely that there has been uncertainty as to what is being required. In addition, if “the majority of confusion” has been primarily a Northeast phenomenon, it is not clear why the Service finds it necessary to defer implementation of the rule outside the Northeast region.

Fifth, the notice states that “gear buyback programs from Maine to North Carolina that have assisted in the conversion of sinking groundline for lobster trap/pot fisheries have already removed a large amount of *sinking* groundline from the ocean” (emphasis added). Presumably the statement was meant to refer to the removal of *floating* groundline. In our view, this point appears to justify rejecting, rather than adopting, the proposed delay. The fact that a large amount of floating groundline has already been replaced demonstrates that fishermen have long been aware of this impending requirement. The Service has been encouraging pot and trap fishermen to switch from floating to sinking groundlines since early in 2002 when it first required sinking line in dynamic and seasonal area management zones. Gear buyback initiatives also have been assisting fishermen to replace floating groundlines since at least 2005. Since the proposed rules were published in June 2006, it also has been widely known that the principal component of the revised plan was a requirement to eliminate floating lines. The fact that thousands of comments by lobster fishermen focused specifically on the groundline requirement strongly indicates that participants in the fishery have clearly understood what was being proposed for several years. In our view, the Service has already invested ample time and effort in advising and preparing fishermen for implementation of this requirement.

Based on these points, we find the Service’s analyses and rationale for deferring the requirement for broad-based use of sinking groundline to be inadequate and unjustified. We also find this measure entirely inconsistent with right whale protection needs. The Marine Mammal Commission therefore recommends that the Service withdraw its proposed amendment to defer until 5 April 2009 the effective date requiring the broad-based use of sinking groundlines and that it retain the current implementation date of 5 October 2008.

Please contact me if you wish to discuss these recommendations and comments.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director