



MARINE MAMMAL COMMISSION

20 April 2015

Ms. Kim Damon-Randall
Assistant Regional Administrator for Protected Resources
Greater Atlantic Region, NMFS
55 Great Republic Drive
Gloucester, MA 01930

Dear Ms. Damon-Randall:

The Marine Mammal Commission (Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service (NMFS) *Federal Register* notice (80 Fed. Reg. 14345) proposing amendments to its regulations for the Atlantic Large Whale Take Reduction Plan (ALWTRP). The notice proposes to exempt areas from requirements adopted in 2014 and modify the Plan's gear marking requirements. The Commission offers the following comments and recommendations.

At the request of state fishery management agencies in Massachusetts, Rhode Island, and Maine, the proposed amendments would exempt various waters under jurisdiction of those states from ALWTRP regulations adopted in 2014. They also would establish new gear marking requirements in two offshore areas previously proposed but not adopted as closures (Jordan Basin and Jeffreys Ledge), and within the newly proposed exempted state waters. The notice states that the changes were based on exemption proposals submitted by the state agencies that "adequately addressed the protocols established by the Team for considering modifications or exemptions to the Plan's regulations." The notice also states that the co-occurrence model used to evaluate plan measures indicates that the increased risk to whales from these changes would be "minimal" and that the Atlantic Large Whale Take Reduction Team (ALWTRT) recommended "by near consensus" that NMFS adopt the proposed exemptions and gear marking provisions as part of the ALWTRP. As discussed below, the Marine Mammal Commission does not consider that the state exemption proposals provide sufficient information to satisfy the established process for considering exemption requests. Therefore the Commission does not believe that the exemptions should be adopted unless they are accompanied by fully compensatory measures to increase protection of large whales, especially North Atlantic right whales.

The Commission is particularly concerned that no trade-off options were presented or considered in any of the state proposals for exemptions to the ALWTRT. The guidance document entitled "Process for Considering Exemptions under the Atlantic Large Whale Take Reduction Plan" lists "information *needed* to help the ALWTRT and NOAA evaluate requests for exemption" (emphasis added). Item four on the list of specific information needs calls for information on "reasonable trade-off options for the areas or gear requirements being considered." Trade-off options are clearly an integral part of considering an exemption request, yet none of the state proposals provided any information on possible trade-off options for the exemption requests

considered at the team's January meeting. Thus, in the Commission's view, the states did not provide necessary information on what they considered a reasonable trade-off or trade-offs. Although the conservation community proposed an option to increase protection, that proposal was considered separately and not adopted. NMFS should explain in the preamble to any final rule on this matter why the incomplete State exemption requests submitted for the January ALWTRT meeting that did not include all listed information needs were considered to "adequately address the protocols established by the team for considering modifications or exemptions."

The *Federal Register* notice states that the requested exemptions would involve a "minimal" additional risk of whale entanglement but does not quantify that risk. Table 4, on page 17 of the analysis accompanying the proposed rule ("Final Environmental Assessment on Modifications to the Atlantic Large Whale Take Reduction Plan"), states that the proposed exemptions would increase the co-occurrence of whales and vertical lines at an annual rate of 8.2 percent. The total projected reduction in co-occurrence in the final ALWTRP before these exemptions was 37.9%. Hence the proposed exemptions would eliminate nearly one quarter of the overall reduction achieved in the final ALWTRP. Seasonally, this annual increase in risk is estimated to include a 17.7 percent increase in co-occurrence in the spring and a 9.1 percent increase in the summer, the seasons when North Atlantic right whales are most likely to occur in the proposed exempted areas. The Commission does not consider these increases "minimal."

The Commission considers such increases in the risk of mortality or serious injury for North Atlantic right whales to be unacceptable. The current North Atlantic right whale stock assessment report indicates a total population size of just 455 whales with a Potential Biological Removal (PBR) level of 0.9 whale. The Commission wishes to underscore that the goals of the ALWTRP have never been met since it was first adopted to reduce entanglement mortality over 16 years ago¹. Indeed, despite amendments to improve the plan's effectiveness, known right whale entanglement deaths have continued to increase. There were 2 confirmed entanglement deaths in the 1990s (0.2/yr), at least 7 between 2000 and 2009 (≥ 0.7 /yr), and 9 from 2010 through 2014 (1.8/yr). This increase is likely directly attributable to consistent weakening of measures in deference to fishing interests without adoption of additional protective measures to compensate for those concessions. Therefore, protective measures need to be significantly improved, not diminished, as proposed in this rulemaking. As indicated in its 13 September 2013 comments on proposed rules for the current ALWTRP, the Commission believed that the ALWTRP proposed at that time was inadequate and that seasonal closures in both the Jordan Basin and Jeffreys Ledge were necessary. Since then, the plan has only been weakened, including the rejection of those two seasonal closures. The additional exemptions now being proposed will only further reduce right whale protection with no compensatory action.

The Commission notes that although the proposed measures provide additional requirements for gear marking, gear marking does nothing to reduce immediate entanglement risks to whales. While most ALWTRT members viewed these measures as an acceptable trade-off, the Commission disagrees with that view. The proposed measures provide no assurance concerning whether or when any further actions might be taken on the basis of information obtained as a result of the expanded gear marking. Therefore gear marking cannot be considered a trade-off that

¹ Pace, R. M., T. V. N. Cole and A. Henry 2014. Incremental fishing gear modifications fail to significantly reduce large whale serious injury rates. *Endangered Species Research* 26:115-126.

compensates for reduced protection. If NMFS disagrees, it must demonstrate how research to clarify entanglement risks can be regarded as a substitute for measures designed to actually reduce entanglement risks. The Commission strongly supports gear marking to improve information on the sources of entangling lines, but the measures proposed in this rule are inadequate and counterproductive to the development of a comprehensive gear marking scheme. The Commission believes that what is needed is a simple color-coded system that requires marks on all traps and gillnets in all waters used by the gillnet and trap fisheries. Such a scheme should be fashioned to identify where whales are entangled, the involved fishery, and the entangled gear part. The incremental gear marking requirements in this proposal do not do that. Indeed, as more effective conservation measures are developed, the requirements likely will need to be changed in the near future to meet the broader objective of a more effective gear marking system, bringing inconvenience and greater costs to the fishermen who implement the marks recommended in this rule.

The Commission believes that it is not appropriate to grant the proposed exemptions without compensatory, or “trade-off,” measures that will prevent the predicted increase in whale entanglement risks resulting from the exemptions. Accordingly, the Commission recommends that NMFS defer action on the proposed exemption measures unless and until such time as additional compensatory or trade-off measures are proposed that would reduce entanglement risks for North Atlantic right whales to at least the same level as was estimated and adopted in the ALWTRP in 2014, and preferably to below that level. The Commission also recommends that NMFS develop a new gear marking requirement that requires all fishermen to mark lines on all traps and gillnets, including in all exempted areas beyond the COLREG line, and reflects a systematic, region-wide approach to maximize information on the location, fishery, and gear part of lines found on entangled whales. The Commission would be pleased to work with NMFS on developing such a scheme.

If you or your staff has questions about these comments and recommendations, please let me know. Thank you for considering these comments.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive, flowing style.

Rebecca J. Lent, Ph.D.
Executive Director