

**MARINE MAMMAL COMMISSION  
4340 EAST-WEST HIGHWAY, ROOM 905  
BETHESDA, MD 20814**

13 January 2004

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1315 East-West Highway, Rm 14564  
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Dear Dr. Hogarth:

During our annual meeting on 21–23 October 2003, the Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals reviewed the status of North Atlantic right whales and related management activities. The situation involving this stock of right whales remains dire and is, in fact, worsening rather than improving. The two causes for the population decline are recognized to be entanglement in fishing gear and ship strikes. However, management efforts to date to reduce serious injury and mortality to right whales have not been effective. In this letter, we summarize some of the information that National Marine Fisheries Service and other scientists presented at the Commission's annual meeting and reiterate previous Commission recommendations. It makes a compelling case that efforts to date to reduce the mortality of right and other large whales have not achieved the conservation standards of either the Marine Mammal Protection Act or the Endangered Species Act.

Commission Recommendations

With regard to reducing the number of deaths and serious injuries of right whales from ship strikes, the Commission provided comprehensive comments to the Service on 28 October 2003 addressing the Service's proposed ship strike strategy. Accordingly, we do not address the ship strike issue in this letter. With regard to entanglement of whales in fishing gear, the Marine Mammal Commission recommends that the Service take immediate action to (1) close all designated right whale critical habitat and adjacent areas known to be used repeatedly by large aggregations of right whales to all gillnet and trap fisheries during seasons of peak whale occurrence, (2) convene a team of marine mammal, fisheries, and ecosystem scientists to review proposed measures identified by the Atlantic Large Whale Take Reduction Team and the National Marine Fisheries Service, and (3) direct that team to develop recommendations for reducing right whale entanglement risks immediately, over the medium term (e.g., five years), and over the long term (up to 20 to 25 years) to required levels.

Entanglements in Fishing Gear

The North Atlantic right whale population currently numbers about 300 whales. The most recent trend analysis suggests that it is declining. Since early 2000 there have been 24 documented entanglements, at least 15 of which have been fatal or potentially fatal (see Table 1). Experience

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with past entanglements suggests that whales that remain entangled for long periods usually die and disappear. Charles “Stormy” Mayo of the Center for Coastal Studies, one of the leading right whale scientists, presented data at the Commission’s annual meeting showing that 95 percent of right whales observed to be seriously entangled probably die unless they are disentangled.

Under the Marine Mammal Protection Act provisions, the potential biological removal level established by the Service for North Atlantic right whales is zero (i.e., no serious injuries or deaths due to entanglements are acceptable). Clearly, this goal is not being met. The incidental take level authorized for regulated fisheries has also been set at zero under the Endangered Species Act to ensure that fishing is not likely to jeopardize the continued existence of the species. This standard, likewise, is not being met. Admittedly, these are difficult standards to achieve. Nevertheless, until the rate of entanglement is reduced from the current average of seven or eight right whales per year, it is likely that the North Atlantic right whale will continue to decline toward extinction.

The Service’s incidental take reduction measures have been based on three fundamental approaches: (1) disentangling whales after the fact, (2) gear modifications to prevent entanglement, and (3) time/area closures. The Commission believes that the Service has consistently placed far too much reliance on disentanglement efforts and unproven gear modifications. The result has been no reduction in whale entanglement.

Disentanglement: We are aware of only four incidents since 2000 in which disentanglement teams have completely removed gear from entangled right whales. Of those, one whale was later found dead of its entanglement wounds and two others remain seriously injured with questionable prospects for survival. Only one disentanglement effort can be judged a clear success. Thus, disentanglement efforts have successfully addressed less than five percent (1 of 24) of known entanglements since 2000. Although we support continued efforts to disentangle animals, particularly right whales, this cannot be the primary remedy to the problem. It does nothing to reduce the likelihood of entanglement and places the people involved in the efforts at great personal risk.

Gear modifications: Gear modification measures implemented by the Service to date have probably resulted in no appreciable increase in the protection afforded right whales. Whales continue to become entangled in fishing gear equipped with break-away links. There is no evidence to support assumptions that such links can effectively reduce entanglements. Conversely, there is good reason to believe that requiring the use of sinking or neutrally buoyant line on lobster traps would be an effective take reduction measure because it removes line from the water column where it can entangle whales. However, to date the Service has imposed that measure only in relatively small areas for brief periods. Even in those instances, it is unclear to what extent fishermen have complied with those rules.

Time/area closures: Time/area fishery closures have also had little success in reducing entanglement risks. This stems primarily from the fact that none of the seasonal closures in critical

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habitats has actually reduced fishing effort in those areas. In addition, the Service's approach to implementing the dynamic area management initiative has undermined its intended purpose of providing prompt, timely protection. This has been caused by the imposition of procedural requirements that delay implementation to a point that whales have likely moved out of the area by the time a closure is implemented. Further, because the Service "requires" only voluntary action to remove gear from designated areas, it is questionable whether dynamic area management has served any value. To our knowledge, the Service has compiled no data documenting the extent to which gear has actually been removed from any of the designated areas.

Critical Habitat: In the Northeast Region, the Service has applied regulatory measures to fishing only within designated critical habitat. However, based on more than a decade of monitoring the occurrence of whales by the Service and others, it is clear that right whales frequent others areas and that the current critical habitat designation should be expanded. Yet the Service recently found, despite its own data to the contrary, that expansion of critical habitat was not warranted. The Commission wrote to the Service on this issue in letters dated 27 February and 5 December 2003.

National Environmental Policy Act: At the Commission's annual meeting in October, members of the National Marine Fisheries Service staff indicated that the agency was developing new gear modification requirements, but that, before those requirements could take effect, it was required to prepare a comprehensive environmental impact statement to assess alternatives. The Commission supports public input and transparency of regulatory decisions. We fail to comprehend, however, how the Service can conclude that much-needed right whale measures require such analyses when the NEPA documents relative to the underlying four fishery management plans, which are woefully out of date, are deemed adequate. This is especially perplexing when one considers that whales are becoming entangled in fishing gear regulated under those plans and that the entanglement rates consistently exceed the incidental take levels necessary to avoid jeopardy. The situation defies logical explanation in light of the applicable requirements of the Marine Mammal Protection Act, the Endangered Species Act, the Magnuson Fishery Conservation and Management Act, and the National Environmental Policy Act.

In light of the concerns noted above, the Marine Mammal Commission again recommends that the Service immediately close all designated critical habitats and any adjacent areas now known to be used repeatedly by large aggregations of right whales to all gillnet and trap fisheries during seasonal occurrences of right whales. The Marine Mammal Commission further recommends that such action be implemented by emergency rule because of the inadequacy of existing measures and the likelihood of additional entanglements pending adoption of other measures.

To address the problem more comprehensively, the Marine Mammal Commission recommends that the Service immediately convene a scientific review team composed of experts in marine mammal conservation, fisheries management, and ecosystem management to identify and develop strategies for implementing the types of fundamental changes in managing fishery interactions with the North Atlantic right whale that are needed to achieve compliance with the

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Marine Mammal Protection Act and the Endangered Species Act. This review team would be separate from, and independent of, the Service's Atlantic Large Whale Take Reduction Team. Although the take reduction team provides a means of identifying a range of possible protective measures, its recommendations consistently have been too weak to be effective in meeting the statutory charge of reducing the incidental mortality and serious injury to less than the stock's potential biological removal level. We attribute this, in part, to the make-up of its membership, which is dominated by fisheries interests who have little incentive to adopt the types of restrictive management measures that appear necessary to reduce entanglement risks.

We believe a separate scientific team is needed to advise the Service as to actions necessary to achieve the established take reduction requirements of the Marine Mammal Protection Act and to avoid jeopardy under the Endangered Species Act. The team should identify the measures required to reduce the mortality and serious injury of right whales to less than the stock's potential biological removal level and set out an immediate implementation strategy. The team should also look at the medium term (e.g., the next five years) and the long term (e.g., within 20 to 25 years) and design strategies for continuing to meet that objective. The team should (1) review alternative actions identified by the take reduction team, as well as measures being developed by the Service based on the team's advice, (2) assess the likely effectiveness of those measures, and (3) identify additional or alternative approaches necessary to achieve the Service's established goal. The team should also be tasked with articulating a long-range plan that considers the optimal mix of fishing approaches, techniques, and practices that are most likely to achieve sustainable fishing with a minimum risk to right whales and regional ecosystems.

We realize that creating a new team such as this would be a significant departure from the way agencies and concerned citizens have approached reducing right whale interactions with fishing gear. We believe it is necessary in this case because efforts to reduce gear-related mortality have not been successful to date.

If you, or your staff, have questions regarding these comments and recommendations, please call.

Sincerely,



David Cottingham  
Executive Director

Attachments

cc: Mr. P. Michael Payne  
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