

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

30 August 2005

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

Dear Ms. Colligan:

On 21 June 2005 the National Marine Fisheries Service published a *Federal Register* notice requesting comments on proposed rules to implement the Atlantic Large Whale Take Reduction Plan. The objective of this rule is to prevent the incidental death and serious injury of North Atlantic right whales in lines from trap fisheries (particularly for lobster) and gillnet fisheries. The proposed rules would implement measures addressed in a related draft environmental impact statement.

By letter of 12 May 2005 (enclosed), the Marine Mammal Commission advised the Service that the draft statement was inadequate because it failed to consider all reasonable alternatives, including measures recommended by the Marine Mammal Commission to close critical habitats to all fishing with gear that poses entanglement risks to northern right whales. We believe that measures considered in that document to prevent entanglement of right whales in vertical buoy lines are not adequate. This opinion was shared by the Atlantic Large Whale Take Reduction Team and by the Service representative at the last team meeting when they agreed that more must be done at the next meeting to prevent entanglements in vertical lines. It is inappropriate to allow gear with such lines in designated critical habitats at times when large numbers of right whales are known to inhabit the area.

Accordingly, with regard to the proposed rules, we incorporate our earlier comments on the EIS and recommendations by reference. The Marine Mammal Commission recommends that the Service adopt rules to prohibit use of all fishing gear employing vertical buoy lines to mark gear locations at times when whales inhabit designated critical habitats until such time as new measures are developed, or existing technology is required, to provide reasonable assurance that right whales will not become entangled.

If you or your staff have questions, please call.

Sincerely,



David Cottingham
Executive Director

Enclosure

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

12 May 2005

Ms. Mary Colligan
Assistant Regional Administrator for Protected Resources
Attention: ALWTRP DEIS
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, has reviewed and provides the following comments and recommendations on the “Draft Environmental Impact Statement for Amending the Atlantic Large Whale Take Reduction Plan.”

The Commission is particularly disappointed that the Service decided summarily to discard the comments we provided during the scoping process for this draft environmental impact statement (DEIS). At that time, we recommended consideration of alternative time/area fishing closures for areas where right whales and other large whales are known to concentrate, such as designated critical habitat. By dismissing evaluation of such closures as an alternative, the Service failed to follow the Council on Environmental Quality’s regulations implementing the National Environmental Policy Act. In part, those regulations require agencies to “rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated” (40 C.F.R. §1502.14). Furthermore, the Marine Mammal Protection Act requires agencies to provide a “detailed explanation of the reasons why those recommendations [of the Commission] were not followed or adopted” (16 U.S.C. §1402 (7)(d)).

For various reasons described in this letter, the Commission finds the analysis provided in the DEIS to be inadequate. A major purpose of an environmental impact statement is to inform decision-makers about the environmental impacts of their decisions. In this case, the preferred alternative relies far too heavily on measures that have not proved adequate for meeting the standards of the Marine Mammal Protection Act or the Endangered Species Act. The most significant features of the existing plan—weak links and limited time/area closures—have been in place for nearly five years without reducing the rate at which large whales are entangled in fishing gear. The most significant feature of the proposed plan is expanded use of sinking line in lieu of floating line for trap and gillnets. However, because the proposed measure would not be fully required until 2008, it will be very difficult, if not impossible, to review the effectiveness of implementing this plan before 2012. Given the critical population level of right whales, they cannot sustain the current rate of serious injury and mortality resulting from entanglement. In the one-and-three-quarters-inch stack of paper comprising the DEIS, we cannot find an assessment of the biological benefit to large whales that is likely to occur as a result of implementing this plan. As much as it pains us to recommend further analysis, the Marine Mammal Commission recommends

that the Service prepare a supplement to the DEIS that analyzes the establishment of time/area closures and clearly assesses how the proposed measures will reduce entanglements sufficiently to meet the standards of the Marine Mammal Protection Act and the Endangered Species Act.

The Marine Mammal Protection Act requires that agencies develop take reduction plans that will reduce the take of strategic stocks of marine mammals to levels at or below the potential biological removal (PBR) level within six months of a plan's implementation. Although the PBR level for North Atlantic right whales has been set at zero because of the species' critically endangered status, several animals have been killed or seriously injured each year over the past decade as the result of incidental entanglement in gear used in East Coast trap and gillnet fisheries. Most of these entanglements have involved either buoy lines (i.e., lines from gear on the bottom to surface buoys) or ground lines (i.e., lines between traps strung together on the bottom), and most have involved lines caught in the animal's mouth. Annual levels of lethal and serious entanglement injuries for Gulf of Maine humpback whales have exceeded the PBR level (i.e., 4.7) for that population as well. As cited in the DEIS, a new analysis (Johnson 2005) of entanglements for which gear parts could be identified found that 28 percent of right whale and humpback whale entanglements involved ground lines, 16 percent involved gillnet float lines, and 64 percent involved either buoy or surface system lines. Since 1999, when the Service first implemented an Atlantic Large Whale Take Reduction Plan, various measures have been adopted to reduce such entanglements. To date, none has resulted in any apparent reduction.

To reduce entanglements in buoy lines and gillnets, past plans have relied almost exclusively on requirements for using weak links with breaking strengths ranging from 600 to 2,000 lbs., depending on the fishery. The rationale for this approach, as described in the DEIS, is that a line caught in a whale's mouth will be pulled through baleen until the weak link is reached, at which point drag from attached gear will snap the weak link and allow the whale to swim free. Although this may have occurred in some cases, the breaking strength of the links has been determined by fishing needs, not whale protection needs, and we are aware of no evidence that weak links have worked as hypothesized. Moreover, of the five right whales disentangled between 2000 and 2003 for which it was possible to inspect the gear, three were entangled in gear equipped with weak links. Two of those had unbroken 600-lb. weak links of the type proposed for use in this plan, and one had gear with a weak link no longer deemed acceptable. Fourteen other right whales were documented as entangled during that period, but it is not known how many of those whales may have been caught in gear equipped with weak links because no gear was recovered for inspection. In addition to these right whale entanglements, we understand that, between 2000 and 2003, at least one humpback whale was entangled in fishing gear with an unbroken 600-lb. weak link. To the best of our knowledge, information on gear removed from disentangled whales since 2003 is not yet available.

With regard to the effectiveness of weak links, the DEIS describes how the Service believes weak links might work, but it provides no data or analysis on how frequently weak links have failed to prevent entanglements in cases for which gear was examined. As a result, the DEIS leaves the false impression that weak links are known to be effective in reducing entanglements and that use of such devices would reduce take to required PBR levels. Based on this limited analysis, all options

identified in the DEIS continue to rely almost exclusively on expanded requirements for deploying weak links to prevent entanglements in buoy lines, surface system lines, and gillnet float lines to reduce take below PBR levels. The considered alternatives include different sets of provisions for at least eight different fisheries, with three different weak link breaking strengths that are applicable in some areas but not others, depending on what fish species are being targeted. In our opinion, these complex sets of restrictions and exceptions are too complicated to be readily implemented throughout the fisheries or to be effectively enforced by the Service and the Coast Guard.

To reduce entanglement in trap fishery ground lines, the DEIS identifies options for requiring the replacement of floating ground line with either sinking line or neutrally buoyant line. Unlike weak links, there is a solid basis for concluding that this approach would substantially reduce entanglement risks with trap fishery ground lines because it will reduce the amount of line in the water column. However, all options considered in the DEIS delay the effective date of this requirement until 2008, and none establishes a mandated phase-in. That is, instead of requiring certain percentages of traps to be rigged with sinking or neutrally buoyant ground line by predetermined dates in advance of 2008, the alternatives rely on incentives of unknown effectiveness to encourage—but not require—increased use of sinking or neutrally buoyant ground lines before 2008. Those incentives are provided by allowing vessels to enter areas otherwise closed to fishing because of large aggregations of right whales. There is no information or analysis in the DEIS on how many fishermen currently fish in those areas or how many, if any, additional fishermen might convert to sinking or neutrally buoyant line before 2008 as a result of being given access to those areas. There also is no information on how requirements for using sinking or neutrally buoyant ground lines will be enforced, either before or after 2008. Because most entanglements occur in buoy lines, this incentive to use improved ground lines comes at the cost of exposing concentrations of right whales to increased entanglement risks in buoy and surface system lines. As a result, there is no basis for estimating whether or to what extent the use of sinking ground lines might increase prior to 2008. By disregarding or discounting the entanglement risks posed by buoy lines on the gear of fishermen that choose to fish with neutral or sinking lines in right whale critical habitat and other high-use right whale habitat, all of the alternatives identified in the plan could actually increase entanglement risks for right whales by encouraging additional buoy line fishing in areas otherwise closed. The Marine Mammal Commission strongly opposes the use of this incentive and recommends that permission to fish in closed areas with sinking ground line not be part of any alternative unless accompanied by an additional measure that requires gear to include no vertical buoy lines (e.g., gear equipped with pop-up buoy systems that eliminate vertical lines in the water column).

Given the limitations of available technology to reduce entanglement risks, particularly in vertical lines, the Commission has recommended in numerous letters to the Service—including its comments during the scoping process for preparing this DEIS—that it develop and adopt measures to prohibit all gillnets and lobster gear with vertical lines in designated right whale critical habitat when right whales are known to be using the area until gear modifications are developed that provide reasonable assurance they will prevent right whale entanglements. This option, however, is not considered in the DEIS other than in a brief note in a table stating that it was rejected and will not be considered until some unspecified date when the Service reassesses boundaries for right

whale critical habitat. This is the same open-ended statement provided by the Service in response to Commission comments on a 9 July 2002 petition to expand right whale critical habitat boundaries. The Commission's recommendations at that time called on the Service to immediately undertake an analysis of right whale sightings in and around right whale critical habitat so as not to delay action to modify boundaries.

In view of the points made in this letter, the Marine Mammal Commission concludes that the DEIS is inadequate in two fundamental ways. First, it fails to analyze available data on the failure of weak links to prevent right whale entanglements in buoy lines and surface system lines, including entanglements that have resulted in lethal and serious injuries. The Marine Mammal Commission therefore recommends that a supplemental DEIS be prepared to provide a thorough discussion of available information on the frequency of whale entanglements in vertical lines that were equipped with weak links. The analysis should document, to the extent possible, why weak links have failed to break in the past. Results of this analysis should then be used to estimate whether, and to what extent, weak links will reduce the number of entanglements under each of the alternatives being analyzed.

Second, the DEIS does not identify or consider feasible options other than weak links for reducing entanglement risks in vertical lines. Therefore the Marine Mammal Commission again recommends that the Service identify and analyze an option to (1) seasonally close right whale critical habitats to all trap fisheries and gillnets with vertical buoy lines until gear modifications are developed that provide assurance that right whale entanglement risks in such lines would be substantially reduced, and (2) require all trap fisheries along the U.S. East Coast to use sinking or neutrally buoyant ground line within one year of adopting the new plan.

Finally, the Marine Mammal Commission again recommends that the Service immediately analyze all available right whale sighting data to reassess appropriate critical habitat boundaries that encompass high-use feeding and calving habitat.

In closing, the Commission points out that the PBR level established by the Service for North Atlantic right whales is zero. The 1999 biological opinions on four fisheries conclude that the entanglement of right whales by lines in the fisheries is likely to jeopardize the continued existence of the species. The opinions recommend reasonable and prudent alternatives that required the measures being analyzed in this DEIS. They also set incidental take levels at zero. Since the opinions were written and implemented, at least 24 entangled right whales have been documented, many of which died or sustained serious injuries. The continuing entanglements, injuries, and deaths of right whales in gear deployed by fishermen along the U.S. East Coast constitute a major, ongoing failure of management with significant conservation ramifications. We urge the Service to use this DEIS to consider the full range of management options that will bring lethal and serious injury takes of all Atlantic large whales to levels that meet the statutory standards of the Marine Mammal Protection Act and the Endangered Species Act.

Ms. Mary Colligan
12 May 2005
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If you or your staff have questions, please call.

Sincerely,

A handwritten signature in black ink that reads "David Cottingham". The signature is written in a cursive style with a long horizontal flourish extending to the right.

David Cottingham
Executive Director

cc: Mr. John E. Hansel
Ms. Rebecca Lent
Mr. P. Michael Payne