

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

19 December 2006

Mr. David M. Bernhart
Assistant Regional Administrator, Protected Resources
Southeast Regional Office
National Marine Fisheries Service
263 13th Avenue, South
St. Petersburg, FL 33701

Dear Mr. Bernhart:

In the 15 November 2006 *Federal Register*, the National Marine Fisheries Service requested comments on a proposed rule to amend regulations under the Atlantic Large Whale Take Reduction Plan covering gillnet fishing in the right whale calving grounds off the southeastern United States. The action was prompted by the 22 January 2006 discovery off Jacksonville Beach, Florida, of a dead right whale calf with evidence of recent entanglement in gillnet gear. The Atlantic Large Whale Take Reduction Plan requires that, in the event of such a death, the National Marine Fisheries Service permanently close the restricted area to gillnet fishing during the right whale calving season (15 November to 31 March) or that it adopt new rules that would establish a level of protection equivalent to such a closure. The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the proposed rule and offers the following recommendations and comments.

RECOMMENDATIONS

The Marine Mammal Commission supports the National Marine Fisheries Service proposal to extend the boundaries of the southeastern restricted area northward to the South Carolina-North Carolina border and recommends that the Service adopt its proposed rule subject to the following modifications:

- Extend the closure period for the northern portion of the proposed restricted area (i.e., waters off South Carolina) to 1 November to 30 April; and
- Extend the outer boundary of the entire proposed restricted area (i.e., including the northward extension) to the seaward edge of the U.S. Exclusive Economic Zone.

RATIONALE

Following the January 2006 right whale entanglement off Florida, the Marine Mammal Commission wrote to the Service on 15 May 2006 recommending revisions to the regulations for the restricted area. In its letter, the Commission recommended that

- (1) the boundary of the southeast restricted area be extended northward to include waters out to 40 nautical miles (nmi) off the coast of South Carolina;
- (2) the main (southern) part of the restricted area be closed permanently to gillnet fishing from 15 November to 15 April; and
- (3) the northward extension off South Carolina be closed permanently from 1 November to 30 April.

The Commission also supported an exception to the regulations that would allow shark and mackerel gillnet fishing south of 29°N latitude, as recommended by the Southeast Subgroup of the Atlantic Large Whale Take Reduction Team during its meeting on 11–12 April 2006.

The Commission's 15 May 2006 recommendation to extend the northern boundary of the restricted area to include waters off South Carolina was based, in part, on recent right whale sightings—including mother/calf pairs—in those waters during the calving season and, in part, on the fact that many other whales move through the area during their southbound and northbound migrations. The recommended extension of the closure dates off South Carolina was to protect migrating whales arriving in or passing through that area early in the reproductive season during their southbound migration and migrating out of or passing through the area late in the season during their northbound migration. The Service's proposed rule incorporates the Commission's recommended northward extension, but sets the seaward boundary at 35 nmi off South Carolina, rather than 40 nmi, and does not extend the effective closure dates for that area to the recommended period from 1 November to 30 April.

The Commission appreciates the Service's consideration of its previous recommendations. Nonetheless, we continue to believe that the dates recommended in our 15 May letter for the extended area off South Carolina are warranted and should be incorporated into the proposed rule. Migration patterns of right whales, especially nursing females with calves, are not well known. Appropriate closure periods will be determined more reliably as more is learned about their migration patterns. However, during their southbound and northbound migrations the whales must occur in the northern area both earlier and later in the season, respectively, than they occur in the southern part of the restricted area. Accordingly, the Marine Mammal Commission again recommends that the effective dates for the proposed restricted area off South Carolina be set at 1 November to 30 April.

With regard to the seaward boundary of the northern extension, the Service asked for comments on whether it should be set at 40 nmi, as originally recommended by the Commission, or 35 nmi, as proposed by the Service. Few data are available to distinguish between these two limits. The whale's spatial distribution, and annual variation therein, off South Carolina are poorly known. The Service's draft environmental impact statement, prepared following the April 2006 meeting of the Southeast Subgroup, proposed extending the southeast restricted area seaward to the boundary of the Exclusive Economic Zone. The proposal was based on low survey effort in offshore waters and uncertainty about the use of those waters by right whales. No gillnet fisheries operate in this area during the winter months. This extension would have no significant economic impact on

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existing activities and would preclude development of a new gillnet fishery in that area. Should future information confirm that right whales do not use the area, the offshore boundaries could be moved accordingly. The Marine Mammal Commission therefore recommends that the proposed rule be modified to extend the outer boundary of the southeast restricted area, including the northward extension off South Carolina, to the seaward edge of the Exclusive Economic Zone.

When managing human activities that could affect a critically endangered species, such as the North Atlantic right whale, the Commission endorses a precautionary approach that establishes a high degree of protection, then allows such protection to be scaled back if new information becomes available that justifies doing so. This approach is preferable to incremental increases in protection that are imposed only after they are supported by conclusive evidence. The latter approach imposes higher costs to the endangered species, which may not be able to withstand them. Our recommendations above are precautionary because losses from fishery interactions appear to be more than the right whale population can overcome and because the poor status of this population warrants more proactive protection.

Once again, thank you for considering our earlier comments and recommendations. If you or your staff has questions on the recommendations in this letter, please contact me.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director