



MARINE MAMMAL COMMISSION

29 June 2017

Ms. Kelly Denit, Division Chief
Domestic Fisheries
Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Re: Comments on 610 Review

Dear Ms. Denit:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors, has reviewed the National Marine Fisheries Service's (NMFS's) 7 June *Federal Register* Notice (62 Fed. Reg. 26419) concerning plans to conduct a review of certain regulations under section 610 of the Regulatory Flexibility Act (RFA). The review is intended to determine if specific rules should remain unchanged, be modified, or be rescinded based on five factors (1) whether they are still needed, (2) complaints or comments received from the public, (3) the complexity of rule requirements, (4) duplication or conflict with other federal, state, or local rules, and (5) how long it has been since the rule was last evaluated and any changes in economic conditions, technology, or other factors since the last review. Among the regulations to be reviewed is a regulation adopted in 2010 to implement the Harbor Porpoise Take Reduction Plan developed under the Marine Mammal Protection Act (MMPA) to reduce the bycatch of harbor porpoises in East Coast gillnet fisheries. The Commission offers the following comments with regard to the review of the harbor porpoise rule under the applicable factors.

1. Whether the rule is still needed

Section 118 of the MMPA directs NMFS to develop a "take reduction plan" to reduce incidental serious injury and mortality of any marine mammal taken in commercial fisheries to a level below the population's Potential Biological Removal (PBR) level within six months of the plan's implementation. As a longer-term goal, the MMPA further directs NMFS to reduce the bycatch toward a Zero Mortality Rate Goal (ZMRG), which is considered to be 10 percent of PBR, within five years of the plan's implementation. In 2007, Gulf of Maine harbor porpoises were being killed incidental to various regional gillnet fisheries at impermissibly high levels largely because of poor compliance with an earlier plan's requirement for the use of pingers and gear modifications. The 2010 regulations that are the subject of this review specified certain consequences if compliance levels did not increase and bycatch rates were not reduced.

The 2010 rule has improved compliance and achieved a steady decline in bycatch levels. The PBR level for this stock of harbor porpoises is currently calculated at 706 porpoises per year. The most recent estimate of harbor porpoise mortality from commercial fisheries was 211 porpoises per year, which is about 30 percent of PBR. This represents substantial progress toward meeting the statutory goals and indicates that the regulations are working. The bycatch level, however, still

exceeds the ZMRG target of 10 percent of PBR. While the MMPA's ZMRG mandate has not yet been met, these regulations have been instrumental in making progress toward that goal.

2. Complaints or comments received from the public

The Commission is not aware of any recent complaints concerning this rule. To help design measures to reduce harbor porpoise bycatch, evaluate their effectiveness, and identify needed modifications, NMFS convened a Harbor Porpoise Take Reduction Team (TRT) in accordance with the requirements of the MMPA. This team is composed of representatives from gillnet fishing organizations, conservation groups, academia, and involved government agencies. The 2010 harbor porpoise regulations were developed as part of a Gulf of Maine Harbor Porpoise Take Reduction Plan that was drafted by this team and reflected a consensus recommendation by all members, including fishery representatives. This structure ensures that public and industry concerns are considered as plans and implementing regulations are being developed. During the TRT's most recent review of the rule and progress toward meeting the plan's goals (a conference call on 30 November 2016), team members confirmed the continuing progress in reducing bycatch and no members complained about the rule's provisions.

3. Complexity of the rule requirements

The 2010 harbor porpoise regulations are complex because they cover a variety of fisheries, conducted in different areas at different times. To address those complexities as well as the concerns of fishery representatives about economic impacts on the fisheries, the team agreed to and adopted separate sets of time-area management requirements and different take reduction approaches and requirements for different areas. Since 2010, this rule has been amended to eliminate some requirements, including some of the "consequence measures." While the provisions remain complex, the rule now is simpler than when originally adopted.

4. Duplication or conflict with other federal, state, or local rules

Section 109(a) of the MMPA preempts states and their political subdivisions from enforcing any state or local laws or regulations relating to the taking of marine mammals. Thus there is little risk that these regulations, designed to limit the taking of marine mammals, will conflict with state or local rules. In addition, under section 118 of the MMPA, regulations designed to reduce impermissibly high levels of marine mammal bycatch are developed by TRTs that are required to include representatives of "each coastal State which has fisheries which interact with the [marine mammal] species or stock." Because TRTs operate by consensus, the risk that regulations developed through this process will ignore or fail to consider State concerns, including potential conflicts, is small.

Potential overlap, duplication, or conflicts with other Federal rules also are avoided through the TRT process. The MMPA requires that TRTs include representatives of Federal agencies, appropriate Regional Fishery Management Councils, interstate fisheries commissions, affected Indian tribal organizations, and the commercial and recreational fisheries involved. As such, there is ample opportunity to identify and resolve conflicts and duplicative regulatory provisions and to coordinate the MMPA process with other Federal efforts. In addition, one regulatory agency

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(NMFS) is responsible for issuing both Federal fisheries regulations and marine mammal incidental take regulations, further limiting the risk of conflicting rules.

5. How long it has been since the rule was last evaluated and any economic, technology, or other changes since the last review

As noted above, the 2010 rule was amended in 2013 (see 4 October 2013 [Federal Register](#) notice), at which time NMFS conducted additional extensive analyses to comply with requirements under the RFA and the National Environmental Policy Act (NEPA) (see [supporting documents](#)). The final measures implemented in the 2013 rulemaking actually *reduced* the regulatory burden by eliminating the “consequence closures” that had been designed to ensure compliance with pinger requirements. Increased outreach, improved compliance, and industry efforts to ensure effective use of pingers have significantly reduced the need for these consequence closures. Given the analyses in this rulemaking, including the economic characteristics of the fishing community as described in the NEPA and RFA analyses, the Commission believes that the measures in place have responded to and precipitated economic, technological, and other changes since the last review that lessen the burden of the 2010 rule.

In conclusion, the Commission believes that the current regulations are effective and working well and sees no reason under the RFA why they should be repealed or modified. Thank you for the opportunity to comment and please contact the Commission should you have any questions regarding our comments and recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style with a large initial "R".

Rebecca J. Lent, Ph.D.,
Executive Director