



MARINE MAMMAL COMMISSION

20 August 2009

Ms. Mary Colligan
Assistant Regional Administrator for Protected Resources
Northeast Region, Protected Resources Division
National Marine Fisheries Service
55 Great Republic Drive, Suite 04-400
Gloucester, MA 01930

Attention: HPTRP Proposed Rule

Dear Ms. Colligan:

On 21 July 2009 the National Marine Fisheries Service published a *Federal Register* notice (74 Fed. Reg. 36058) requesting comments on a proposed rule to modify regulations implementing the Harbor Porpoise Take Reduction Plan. The purpose of the plan and the proposed rule is to reduce the incidental mortality and serious injury of Gulf of Maine-Bay of Fundy harbor porpoises in gillnet fisheries along the Atlantic coast. The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the proposed rule and the accompanying environmental assessment and offers the following recommendations and rationale.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service adopt the proposed rule implementing amendments to the Harbor Porpoise Take Reduction Plan, provided that it—

- base harbor porpoise bycatch estimates on all the regional fisheries that seriously injure or kill them;
- consult with its Canadian counterpart regarding the need to resume an observer program to assess harbor porpoise bycatch in the sink gillnet fishery;
- follow the recommendations of its take reduction team and codify in its regulations the western Gulf of Maine closure area as part of the Harbor Porpoise Take Reduction Plan;
- expand the system of harbor porpoise management areas off New England as proposed so that all gillnets would have to be equipped with pingers during prescribed seasons and implement any “consequence closure areas” to close gillnet fishing in identified areas for specified time periods if bycatch rates exceed threshold levels after two years or during any subsequent two-year period. The Service also should describe the steps and timing involved in implementing these “consequence closure areas” in the preamble to the final rule and incorporate all necessary environmental analyses in the accompanying documentation;
- implement regulations as proposed to establish a second seasonal management area in waters off New Jersey where harbor porpoise bycatch levels have been high. The regulations should include the stringent gear restrictions already applicable on a seasonal basis in the existing management zone in this area and should close this new area completely from 1 February to 15 March; and

- either (1) provide pinger detection devices to fishery observers working in areas where pingers are required to determine if pingers on nets being monitored are functioning properly, or (2) if this is not possible, provide observers with extra pingers to replace the two nearest the location of any porpoise that is caught in a net so that those pingers can be collected for testing.

RATIONALE

The preamble to the proposed rule notes that the number of Gulf of Maine-Bay of Fundy harbor porpoises incidentally killed in fisheries has increased in recent years to levels exceeding the stock's potential biological removal level (610 porpoises per year). The increase appears to be due largely to poor compliance by fishermen (e.g., fishing without pingers in areas where pingers are required, fishing in closed areas, and fishing with nets longer than allowed). In response, the National Marine Fisheries Service reconvened its Harbor Porpoise Take Reduction Team in the winter of 2007–2008. Based on the team's recommendations, the Service has proposed regulatory and non-regulatory revisions to the Harbor Porpoise Take Reduction Plan. In the Commission's view, the team's recommendations were appropriate and well placed. If fishermen comply with the proposed provisions, bycatch of harbor porpoises should be reduced below the potential biological removal level. The Marine Mammal Commission commends the Harbor Porpoise Take Reduction Team and the Service for efforts to address the increased take from the Gulf of Maine-Bay of Fundy stock of harbor porpoises.

Page 36059, column 2, second complete paragraph: This paragraph notes that the most recent estimate of harbor porpoise bycatch is from the 2007 stock assessment report and that the current estimate (based on a five-year running average) is 652 porpoises, of which 475 are attributed to the northeast sink gillnet fishery and 177 to the mid-Atlantic gillnet fishery. Since this proposed rule was prepared, a new stock assessment report has been completed indicating that the latest five-year average take in these fisheries increased to 866, including 567 in the northeast and 299 in the mid-Atlantic region. Most of this increase is attributed to increasing bycatch in the mid-Atlantic region where estimated bycatch between 2002 and 2006 increased steadily from 76 to 511 porpoises per year. In addition, the northeast bottom trawl fishery in the Gulf of Maine and the Canadian sink gillnet fishery in the Bay of Fundy also seriously injure and kill harbor porpoises. Although observers have collected data for the bottom trawl fishery, the Service has not extrapolated those data to generate an estimate of total incidental take in that fishery. In addition, Canadian fisheries managers have not used observers to monitor the Bay of Fundy sink gillnet fishery for the past five years, although this fishery is known to have taken significant numbers of porpoises in the 1990s when Canada did support an observer program.

To ensure the accuracy of take estimates, the Marine Mammal Commission recommends that the National Marine Fisheries Service base bycatch estimates on all the regional fisheries that seriously injure or kill harbor porpoises. To do so, the Service will need to estimate the total harbor porpoise bycatch mortality in the northeast bottom trawl fishery from available observer data and in the Bay of Fundy groundfish sink gillnet fishery. The Marine Mammal Commission further

recommends that the National Marine Fisheries Service consult with its Canadian counterpart regarding the need to resume an observer program to assess harbor porpoise bycatch in the sink gillnet fishery.

Page 36062, Take Reduction Team Recommendations for the Gulf of Maine Region: The take reduction plan is based on the assumption that the western Gulf of Maine closure area established under the Multispecies Fishery Management Plan would remain in effect indefinitely and thereby prevent harbor porpoise bycatch in this area. However, the fishery management plan is subject to change based on recommendations of the New England Fishery Management Council. In addition, fisheries observers have documented gillnet fishing within the boundaries of the closure area despite year-round fishing prohibitions. The take reduction team recommended that the Service codify the western Gulf of Maine closure area to make it permanent, but the Service's proposed rule does not do so. Instead, the accompanying environmental assessment briefly notes that the Service rejected the recommendation because (1) the New England Fishery Management Council is not currently considering modifications to the western Gulf of Maine closure area, (2) the Service believes that including the closure in the take reduction plan would not result in added protection, and (3) existing regulations already require the use of pingers as a porpoise bycatch mitigation measure in nearly half of the area under consideration.

The Service's rationale is not sufficient to reject the team's recommendation. With regard to the first point, changes to fishery management plans are almost always adopted by the Service in response to fishery management council recommendations, which are based principally on council deliberations related to the conservation of fish stocks and fisheries, rather than harbor porpoises. The Harbor Porpoise Take Reduction Team has no role in fishery management council decisions on fishery management plans. Incorporating this rule under the harbor porpoise plan, however, would assure that no changes are made to that closure unless and until the harbor porpoise team deems them consistent with the goals and objectives of harbor porpoise conservation. Given that the western Gulf of Maine closure area includes and abuts an area of historically high harbor porpoise bycatch and that the harbor porpoise plan is predicated on an assumption that this closure will remain in effect, it is essential that this closure be included in the plan to assure that fishery management council decisions alone do not lead to a resumption of gillnet fishing in this area.

With regard to the second point, including this measure under the Harbor Porpoise Take Reduction Plan would offer additional legal protection, such as through higher penalties. By codifying this closure under the harbor porpoise plan, courts would be able to impose independent fines under both fishery management plan and harbor porpoise plan regulations, thereby offering the potential for increased fines. Moreover, depending on the nature of the violation and evidence related to harbor porpoise bycatch, a judge may determine that a higher fine is warranted for violations of the harbor porpoise plan than for violations of the fishery management plan. Without measures in place under both plans, penalty options would be limited.

With regard to the third point, the existing management zone already requiring the use of pingers is not an equivalent substitute for a full closure. Approximately half of the area

recommended for closure is not covered by any of the existing plan's requirements. Although full compliance with pinger requirements should reduce porpoise bycatch, it would not prevent all bycatch, as would a closure, nor would it cover the entire area now closed. Therefore, neither existing nor proposed harbor porpoise plan measures would adequately compensate for the possible elimination of the closure as a result of fishery management council action.

Accordingly, the Marine Mammal Commission recommends that the National Marine Fisheries Service follow the recommendations of its take reduction team and codify in its regulations the western Gulf of Maine closure area as part of the Harbor Porpoise Take Reduction Plan.

Pages 3063-3064, New England Component: This section describes two proposed measures. The first is to expand the system of harbor porpoise management areas within which all gillnets would have to be equipped with pingers during prescribed seasons. The second involves a series of "consequence closure areas" that would be closed to all gillnet fishing for specified periods of time if bycatch rates exceed threshold levels after two years or during any subsequent two-year period. Both of these measures are consistent with recommendations provided by the Harbor Porpoise Take Reduction Team. The Marine Mammal Commission considers them both to be appropriate and recommends their adoption.

The last two paragraphs of this section note that the Service would establish "consequence closure areas" through rulemaking. Doing so will inevitably lead to delays in implementation. Instead, by identifying the areas and the time periods of those areas in the current rulemaking and analyzing their effects in the accompanying environmental assessment, the Service would be able to go directly to issuance of a final rule to implement the consequence closure areas if it determines that bycatch has not been reduced sufficiently. This "programmatic" approach would shorten the length of time needed to implement these measures by avoiding the need for proposing new rules and preparing the accompanying documentation. The Commission supports this approach but notes that the steps the Service would need to take are not described in the preamble or included in the accompanying environmental analyses. To facilitate the rulemaking steps for establishing these areas, the Service should describe the steps and timing that would be involved in implementing any needed "consequence closure areas" in the preamble to the final rule and incorporate all necessary environmental analyses in the accompanying documentation.

Page 36064, Mid-Atlantic Component: This section describes proposed regulations to establish a second seasonal management area in waters off New Jersey where harbor porpoise bycatch levels have been high. The Service would apply stringent gear restrictions already applicable on a seasonal basis in the existing management zone in this area to this second management area. In addition, this new area would be closed completely from 1 February to 15 March. The boundaries, gear restrictions, and effective periods for this new area are consistent with Harbor Porpoise Take Reduction Team recommendations and appear to be appropriate. The Marine Mammal Commission recommends their adoption.

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Page 36065–36066, Monitoring Effectiveness: This section describes various enforcement and non-regulatory measures to be included in the Harbor Porpoise Take Reduction Plan. The actions described in this section are particularly important given the poor compliance with past measures. The Marine Mammal Commission finds the low level of compliance with past regulations and the fact that information on this has come to light principally through the fishery observer program, rather than the enforcement program itself, to be particularly disturbing. Enforcement and industry outreach efforts must be far more vigorous than they have been. The identified efforts to address this need (e.g., conducting annual workshops with gillnet fishermen, coordinating enforcement efforts with state enforcement officers, working with states to codify gear requirements under state law, and distributing pinger detection devices to state enforcement officers to help monitor for the presence of functioning pingers) appear appropriate and necessary. We also note that, because of difficulties in checking whether pingers are working properly at sea, the Harbor Porpoise Take Reduction Team considered the possibility of establishing a shoreside pinger inspection program to assure that all gillnetters fishing in areas where pingers are required have a full complement of functioning pingers. Although this was not adopted as a team recommendation, the Commission believes it would be an appropriate action for the Service to develop in cooperation with state enforcement agents.

One action that is not mentioned in this section but which was recommended by the Harbor Porpoise Take Reduction Team is ensuring that fishery observers are able to determine, not only if nets they observe being hauled have pingers, but also whether the pingers are working properly. In addition, if a harbor porpoise is caught in a net being hauled, it should be standard protocol to check the pingers nearest the point where the porpoise was caught to determine if they are working properly. To that end, the Marine Mammal Commission recommends that, if it is not already doing so, the Service either (1) provide pinger detection devices to fishery observers working in areas where pingers are required to determine if pingers on nets being monitored are functioning properly, or (2) if this is not possible, provide observers with extra pingers that could replace the two nearest the location of any porpoise that is caught in a net so that those pingers can be collected for testing.

Please contact me if you have questions about these recommendations or their rationale.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director