

matters that significantly or uniquely affect their communities.”  
 Today’s rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

**IX. Submission to Congress and the Comptroller General**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 15, 1998.

**James Jones,**

*Director, Registration Division, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

**PART 180—[AMENDED]**

1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 346a and 371.

2. Section 180.503 is amended, by alphabetically adding to the table in paragraph (b), the commodity to read as follows:

**§ 180.503 Cymoxanil; tolerance for residues.**

- (a) \* \* \*
- (b) \* \* \*

Commodity	Parts per million	Expiration/Revocation Date
Hops, dried .....	1	4/15/00

[FR Doc. 98-32003 Filed 12-1-98; 8:45 am]  
 BILLING CODE 6560-50-F

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 229**

[Docket No. 970129015-8287-08; I.D. 042597B]

RIN 0648-A184

**Taking of Marine Mammals Incidental to Commercial Fishing Operations; Harbor Porpoise Take Reduction Plan Regulations**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule; notice of availability of take reduction plan.

**SUMMARY:** Pursuant to the Marine Mammal Protection Act (MMPA), NMFS issues a final rule to implement a harbor porpoise take reduction plan (HPTRP) in the Gulf of Maine and Mid-Atlantic waters. The HPTRP is contained in the HPTRP/ Environmental Assessment/ Final Regulatory Flexibility Analysis (HPTRP/EA/FRFA), available upon request (see addresses below). In the Gulf of Maine, these final regulations put into place a series of time and area closures where pingers are required: in the Mid-Coast Closure Area (September 15 through May 31), the Massachusetts Bay and Cape Cod South Closure Areas (December 1 through February 28/29 and April 1 through May 31) and establish a new closure area, the Offshore Closure Area, where pingers are required November 1 through May 31. A complete closure has been added in the Cashes Ledge Closure Area, February 1-28/29. These regulations require any fishermen using pingers in the closed areas where pingers are allowed, to receive training and be certified in pinger use. A certificate must be carried onboard the vessel. In the Mid-Atlantic, this plan closes New Jersey waters from January 1 through April 30 to large and small mesh gear unless gear meets the specified gear modifications. This plan closes southern Mid-Atlantic waters from February 1 through April 30 to large and small mesh gear unless gear meets the specified gear modifications. This plan closes New Jersey waters from April 1-April 20 and southern Mid-Atlantic waters from February 15-March 15 for large mesh gear. The region known as

the New Jersey Mudhole is closed to small and large mesh gear from February 15-March 15. All small and large mesh gear in the Mid-Atlantic must be tagged by January 1, 2000.

**DATES:** Effective January 1, 1999, except for § 229.33 (a)(2) which becomes effective December 2, 1998, § 229.33(a)(5) which becomes effective December 8, 1998, and § 229.33(a)(3) and (a)(4) which become effective December 16, 1998.

**ADDRESSES:** Copies of the draft plan prepared by the Gulf of Maine Take Reduction Team (GOMTRT), the final report from the Mid-Atlantic Take Reduction Team (MATRT) and the HPTRP/EA/FRFA may be obtained from Donna Wieting, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226.

**FOR FURTHER INFORMATION CONTACT:** Donna Wieting, NMFS, 301-713-2322, or Laurie Allen, NMFS, Northeast Region, 978-281-9291.

**SUPPLEMENTARY INFORMATION:** This final rule implements a take reduction plan (TRP) for the Gulf of Maine (GOM) stock of harbor porpoise, a strategic marine mammal stock that interacts with the Northeast (NE) multispecies gillnet fishery and with the Mid-Atlantic coastal gillnet fishery. A strategic stock is a stock: (1) for which the level of direct human-caused mortality exceeds the potential biological removal (PBR) level (the maximum number of animals, not including natural mortalities, that may be annually removed from a marine mammal stock without compromising the ability of that stock to reach or maintain its optimum population level); (2) that is declining and is likely to be listed under the Endangered Species Act (ESA) in the foreseeable future; or (3) that is listed as a threatened or endangered species under the ESA. NMFS proposed listing the GOM harbor porpoise as threatened under the ESA (58 FR 3108, January 7, 1993), but no final action has been taken on that proposal.

The NE multispecies sink gillnet fishery is a Category I fishery, and the Mid-Atlantic coastal gillnet fishery is a Category II fishery, as classified under Section 118 of the MMPA. A Category I fishery is a fishery that has frequent incidental mortality and serious injury

of marine mammals. A Category II fishery is a fishery that has occasional serious injuries and mortalities of marine mammals.

Section 118 of the MMPA requires NMFS to develop and implement a TRP to assist in the recovery or to prevent the depletion of each strategic stock that interacts with a Category I or II fishery. The immediate goal of a TRP is to reduce, within 6 months of its implementation, the level of mortality and serious injury of strategic stocks incidentally taken in the course of commercial fishing operations to less than the PBR levels established for such stocks. The long-term goal of a TRP is to reduce the level of mortality and serious injury of strategic stocks incidentally taken in the course of commercial fishing operations to a level approaching a zero mortality rate (ZMRG).

#### **Stock Assessment and Incidental Takes by Fishery**

The PBR level for GOM harbor porpoise throughout their range is 483 animals (62 FR 3005, January 21, 1997). The estimated total annual average mortality from the NE and Mid-Atlantic gillnet fisheries is 2,040. This estimate is based on a 5-year (1990–1995) average mortality estimate of 1,833 (Waring *et al.*, 1997) for the GOM and based on preliminary analysis of 1995 and 1996 data from the Mid-Atlantic of 207 animals (Palka, unpublished data).

#### **Take Reduction Teams (TRTs)**

NMFS convened the GOMTRT in February 1996. The goal of the GOMTRT was to develop a consensus draft TRP to reduce the incidental take of harbor porpoise in sink gillnets in the GOM to the PBR level for that stock within 6 months of the TRP's implementation. The GOMTRT focused only on bycatch off New England's coast (Maine to Rhode Island). The GOMTRT was convened with the understanding that a separate take reduction team (TRT) would address harbor porpoise bycatch in the Mid-Atlantic.

While the individual Teams did not specifically address whether measures are necessary to reach the ZMRG at this time, the TRT process will address the ZMRG after the initial measures have been monitored. NMFS and the TRT can then determine whether further reductions, if any, may be necessary to reach the long-term goal.

The GOMTRT included representatives of the NE multispecies sink gillnet fishery, NMFS, state marine resource managers, the New England Fishery Management Council (NEFMC), environmental organizations, and

academic and scientific organizations. The GOMTRT met five times between February and July 1996 and submitted a consensus draft TRP (draft GOMTRP) to NMFS in August 1996.

Soon after NMFS received the draft GOMTRP, the NEFMC enacted Framework Adjustment 19 (61 FR 55774, October 29, 1996) to the NE Multispecies Fishery Management Plan (FMP). Based on this action, NMFS modified the draft GOMTRP to be consistent with Framework Adjustment 19. NMFS published an initial proposed rule to implement a TRP for harbor porpoise in the GOM (62 FR 43302, August 13, 1997). The proposed rule to implement the GOMTRP was available for a 60-day public comment period.

NMFS reconvened the GOMTRT in December 1997 to evaluate new bycatch data that suggested that the GOMTRP would not achieve PBR for harbor porpoise in the GOM. NMFS reopened the public comment period on the GOMTRP proposed rule for one month during the deliberations of the GOMTRT.

At the December 1997 meeting, the GOMTRT agreed on a number of additional measures for bycatch reduction that were presented to NMFS in the form of a report on January 14, 1998 (RESOLVE, 1998). In their recommendations, the GOMTRT took into account the significant changes in groundfish conservation measures proposed under Framework 25 of the NE Multispecies FMP which partially overlapped existing marine mammal closures (Framework 25 was under consideration by the NEFMC during the GOMTRT meeting in December 1997 and was not implemented until May, 1998). Framework 25 allowed continued use of pingers in the Mid-coast area from March 25 through April 25 and closed the Jeffreys Ledge portion of the Mid-Coast area year-round.

The GOMTRT recommended the following measures to achieve PBR: (1) maintain the existing Northeast Closure from August 15 through September 13; (2) close Cape Cod South from March 1 through March 31; (3) close Massachusetts Bay from March 1 through March 31; (4) close the Mid-Coast area from March 24 through April 26; (5) require pingers from September 15 through March 24 and April 26 through May 31 in the Mid-Coast area; (6) require pingers from September through May in the Cape Cod South area; (7) require pingers the months of February and April in the Massachusetts Bay area; and (8) require pingers September 1 through May 31 in the Offshore area.

In February 1997, NMFS convened the MATRT to address the incidental bycatch of harbor porpoise in Mid-Atlantic gillnet fisheries (from New York through North Carolina). The MATRT included representatives of the Mid-Atlantic coastal gillnet fisheries, NMFS, state marine resource managers, the Mid-Atlantic Fishery Management Council (MAFMC), the NEFMC, the Atlantic States Marine Fisheries Commission (ASMFC), environmental organizations, and academic and scientific organizations. The MATRT submitted a report to NMFS on August 25, 1997, which included both consensus and non-consensus recommendations.

The MATRT recommended management measures specific to the two predominant coastal gillnet fisheries, i.e., the monkfish and dogfish fisheries. It recommended that the timeframe for effectiveness be from January through April off New Jersey and from February through April off the southern Mid-Atlantic (Delaware, Maryland, Virginia and North Carolina). The management measures that the team suggested focused on those gear characteristics that demonstrated the most potential for bycatch reduction. For the monkfish fishery, these measures included reduced floatline length, larger twine size, tie downs, and a limit of 80 nets. For the dogfish fishery, the measures included reduced floatline length, larger twine size, and a 45-net limit. Additionally, the MATRT recommended time/area closures for the monkfish fishery in New Jersey waters (February 15–March 15) and in the southern Mid-Atlantic (20 day block between February and April, chosen by the fishermen) but no time/area closures for the dogfish fishery.

Both the GOMTRT and the MATRT recommended certain non-regulatory measures. The non-regulatory aspects of the HPTRP are discussed in the HPTRP/EA/FRFA. The following summarizes NMFS efforts to address the concerns raised by the GOMTRT and MATRT:

(1) As part of the HPTRP, NMFS is developing a research plan to assess long-term ecosystem impacts from widespread use of pingers.

(2) As part of a monitoring strategy for the HPTRP, NMFS is working with the ASMFC on the Atlantic Coastal Cooperative Statistics Program to provide managers with more timely bycatch and fisheries information on the Atlantic Coast.

(3) NMFS is investigating options for providing support to fishermen for pinger technology.

(4) NMFS began pinger training and certification for all fishermen who wish

to use pingers in the closed areas in September 1998.

(5) NMFS has expanded its capabilities to do analytical research by hiring additional staff for its Northeast Fisheries Science Center (NEFSC). Additional resources will be considered during normal funding and staffing allocation discussions in light of other agency responsibilities.

(6) NMFS has expanded its capabilities to observe the Mid-Atlantic fisheries by exploring alternative platforms to obtain a better characterization of coastal fisheries that were not accessible to the traditional Sea Sampling Observer Program.

(7) The HPTRP provides for voluntary skipper education workshops in the Mid-Atlantic.

(8) Although NMFS has expanded its capabilities with respect to observing

the Mid-Atlantic fisheries, NMFS will continue to increase observer coverage at levels consistent with a valid sampling scheme because of limited resources. Additionally, NMFS is expanding observation from alternative platforms and is increasing responsiveness to observed strandings.

To provide the necessary coordination between the Teams and consistency across the regions, NMFS, at the recommendation of the GOMTRT, included several members of the GOMTRT on the MATRT. NMFS will strive to ensure that data on bycatch and effort in both areas will be shared with both teams. A specific discussion of these recommendations and NMFS' response are contained in the HPTRP/EA/FRFA.

**Proposed Rule/HPTRP**

NMFS combined the GOMTRP and MATRT report into one proposed HPTRP and proposed rule which was published on September 11, 1998 (63 FR 48670). The proposed HPTRP was based in large part on recommendations by the GOMTRT and the MATRT and was divided into a GOM component and a Mid-Atlantic component. NMFS is considering whether or not the two Teams should continue to meet separately or whether some or all of the meetings should be combined.

**Final Rule/HPTRP**

*Gulf of Maine Component*

Table 1 sets forth the HPTRP management measures for the Gulf of Maine in the final rule (see Figure 1).

TABLE 1.—GULF OF MAINE TIME/AREA CLOSURES TO GILLNET FISHING AND PERIODS DURING WHICH PINGER USE ARE REQUIRED UNDER THE FINAL RULE/HPTRP

Northeast Area: August 15–September 13 .....	Closed.
Mid-Coast Area: September 15–May 31 .....	Closed, gillnet with pingers allowed.
Massachusetts Bay Area: December 1–February 28/29 .....	Closed, gillnet with pingers allowed.
March 1–31 .....	Closed.
April 1–May 31 .....	Closed, gillnet with pingers allowed.
Cape Cod South Area: December 1–February 28/29	Closed, gillnet with pingers allowed.
March 1–31 .....	Closed.
April 1–May 31 .....	Closed, gillnet with pingers allowed.
Offshore Area: November 1–May 31 .....	Closed, gillnet with pingers allowed.
Cashes Ledge Area: February 1–28/29 .....	Closed.

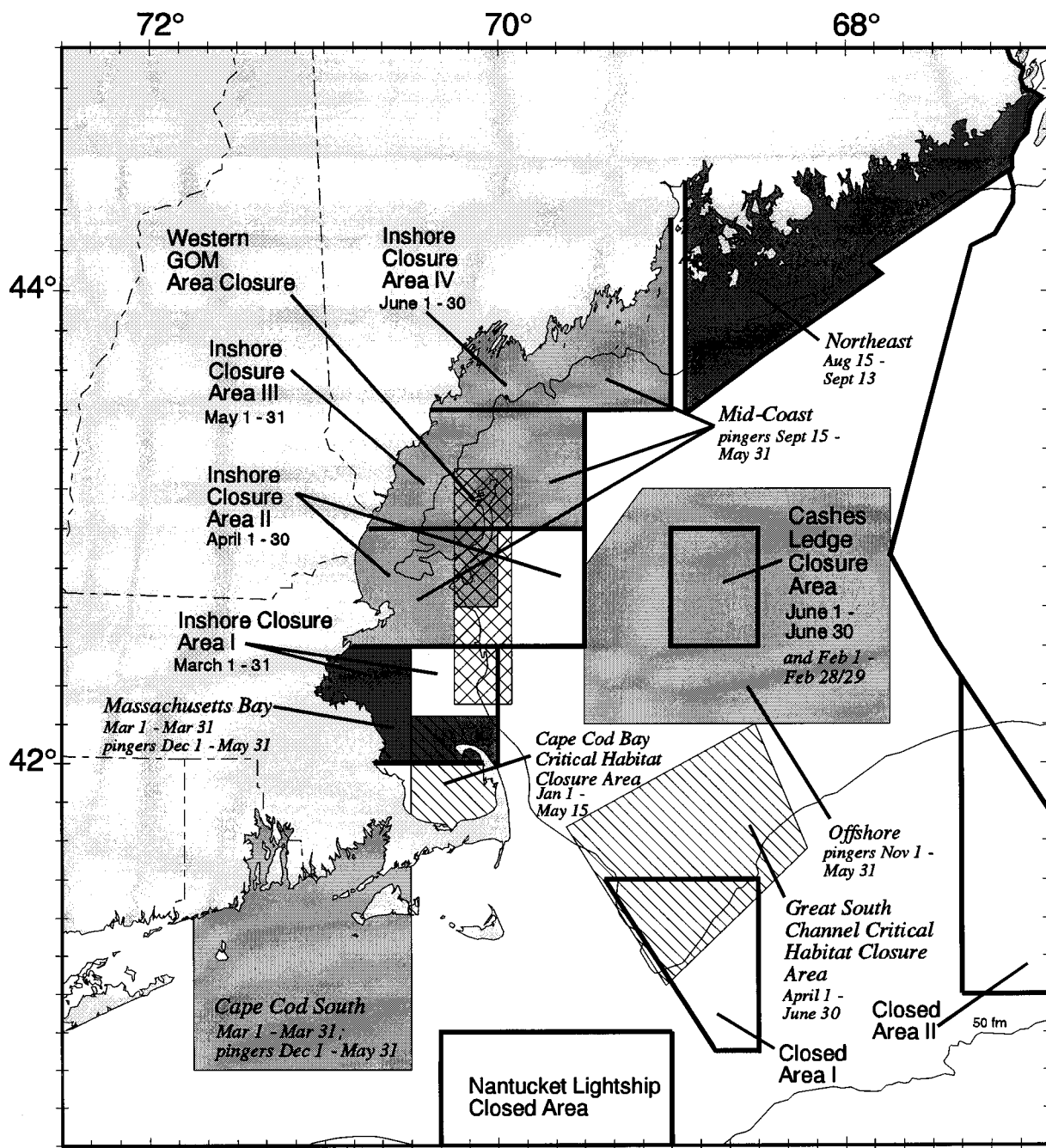


Figure 1. Chart of closures under the Gulf of Maine component of the Harbor Porpoise Take Reduction Plan and closures under the Northeast Multispecies Fishery Management Plan (FMP). Areas on the chart delineated by bold, linear outline with labels in regular type correspond to NE Multispecies FMP; labels in italic type identify shaded areas of harbor porpoise measures.

The HPTRP regulations maintain the comprehensive approach of the proposed rule.

The proposed HPTRP would have closed the Northeast Area to sink gillnet fishing from August 15 through September 13 of each year. The final rule makes no changes to this measure.

The proposed HPTRP did not include a complete closure in the Mid-Coast Area but required pingers from September 15 through May 31. The final rule represents no changes from the proposed rule.

The proposed HPTRP provided that Massachusetts Bay remain closed in March, the time of year during which most known takes in the region were recorded, and proposed that pingers be required during February, April, and May to reduce the take of harbor porpoise in other spring months. Based on public comments and to address data which showed observed takes in the winter months in Massachusetts Bay, pinger requirements are extended to include the months of December and January in this final rule.

In the South Cape area, the proposed HPTRP would have required pingers

from September 15 through February, and then again in April to account for uncertainty in estimated bycatch in this area throughout the year. Based on public comments and on the lack of observed takes in the fall months, this final rule changes the beginning of the time period for pinger requirements from September 15 to December 1. To account for observed takes that have occurred later in the spring, the HPTRP has extended the pinger requirement to include May 1 through 31. These changes are expected to ease the burden (both in economic terms and in terms of the additional effort expended to use pingers) on the South Cape fishermen by allowing for more fishing time without pingers. This change is not expected to affect projected bycatch reduction from the South Cape area because, based on current observer data, the plan will achieve the same or greater bycatch reduction in May, when takes have been observed, than in the fall months.

The proposed HPTRP provided for closing the Cashes Ledge section of the Offshore area in February and would have required pingers from September

15 through May in the broader Offshore area. The final HPTRP does not change the Cashes Ledge closure in February but modifies the time of pinger use to begin November 1, rather than September 15, based on lack of observed takes between September 15 through October 31. These changes ease the burden (both in economic terms and in terms of the additional effort expended to use pingers) on New Hampshire and Maine fishermen during the times of no observed bycatch. This change should not affect overall plan effectiveness because, based on current observer data, little bycatch reduction is expected in September and October in the Offshore area.

*Mid-Atlantic Component*

Tables 2 and 3 set forth the HPTRP management measures for the large mesh (includes gillnet with mesh size of greater than 7 inches (17.78cm) to 18 inches (45.72cm)) and small mesh (includes gillnet with mesh size of greater than 5 inches (12.7 cm) to less than 7 inches (17.78cm)) gillnet fisheries in the Mid-Atlantic (see Figure 2).

TABLE 2.—MANAGEMENT MEASURES FOR THE LARGE MESH GILLNET FISHERY (INCLUDES GILLNET WITH MESH SIZE GREATER THAN 7 INCHES (17.78CM) TO 18 INCHES (45.72CM)) IN THE MID-ATLANTIC UNDER THE FINAL RULE/HPTRP

Floatline Length:	
New Jersey Mudhole .....	Less than or equal to 3,900 ft (1188.7 m).
New Jersey Waters (excluding the Mudhole) .....	Less than or equal to 4,800 ft (1463.0 m).
Southern Mid-Atlantic waters .....	Less than or equal to 3,900 feet (1188.7 m).
Twine Size	
All Mid-Atlantic Waters .....	Greater than or equal to .90 mm (.035 inches).
Tie Downs	
All Mid-Atlantic Waters .....	Required.
Net Cap	
All Mid-Atlantic Waters .....	80 nets.
Net Size .....	A net must be no longer than 300 feet (91.4m) long.
Net Tagging .....	Requires all nets to be tagged by January 01, 2000.
Time/Area Closures:	
New Jersey waters to 72°30' W. longitude (including the Mudhole) .....	Closed from April 1–April 20.
New Jersey Mudhole .....	Closed from February 15–March 15.
Southern Mid-Atlantic waters (MD, DE, VA, NC) to 72°30' W. longitude .....	Closed from February 15–March 15.

TABLE 3.—MANAGEMENT MEASURES FOR THE SMALL MESH GILLNET FISHERY (INCLUDES GILLNET WITH MESH SIZE OF GREATER THAN 5 INCHES (12.7 CM) TO LESS THAN 7 INCHES (17.78CM)) IN THE MID-ATLANTIC UNDER THE FINAL RULE/HPTRP

Floatline Length:	
New Jersey waters .....	Less than or equal to 3,000 feet (914.4 m).
Southern Mid-Atlantic waters .....	Less than or equal to 2,118 feet (645.6 m).
Twine Size:	
All Mid-Atlantic waters .....	Greater than or equal to .81 mm (.031 inches).
Net Cap:	
All Mid-Atlantic waters .....	45 nets.
Net Size .....	A net must be no longer than 300 feet (91.4m) long.
Net Tagging .....	Requires all nets to be tagged by January 1, 2000.
Time/Area Closures:	
New Jersey Mudhole .....	Closed from February 15–March 15.

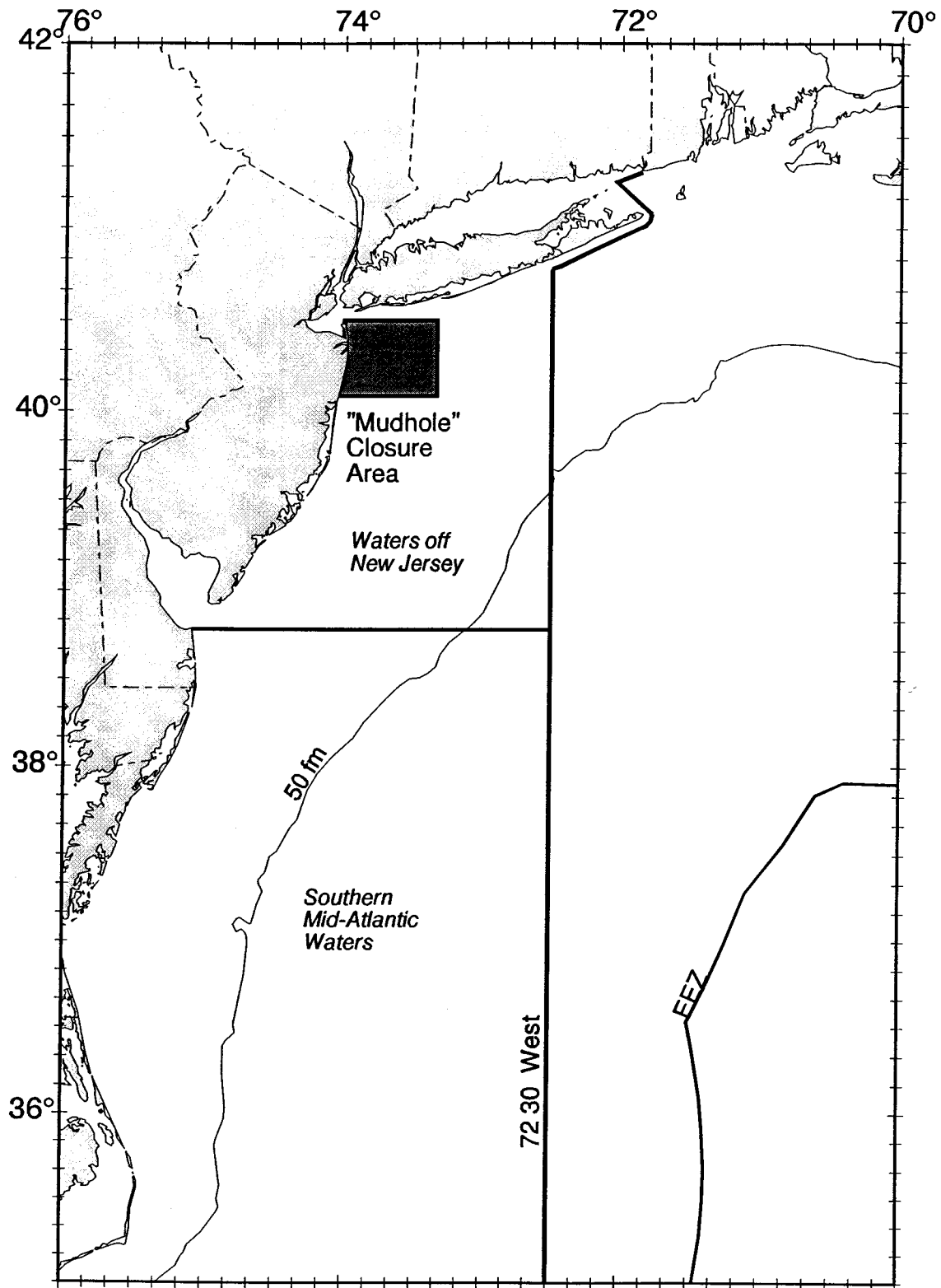


Figure 2. Mid-Atlantic component

The Mid-Atlantic component of the HPTRP is generally consistent with the proposed HPTRP, except as discussed below. The gear modifications in the final HPTRP remain the same as in the proposed HPTRP. The effective period remains the same as described in the proposed HPTRP: January 1 through April 30 for New Jersey waters, and February 1 through April 30 for southern Mid-Atlantic waters. Additionally, stratification by fishery based on mesh size remains the same as in the proposed HPTRP.

The most significant change from the proposed HPTRP is the application of the management measures within the small mesh fishery. In the proposed plan, the small mesh fishery was defined as all those fisheries employing mesh size of less than 7 inches (17.78 cm). Stranding data and related bycatch information suggest that certain small mesh fisheries could be a source of harbor porpoise bycatch. This information, along with the assumptions inherent in the bycatch analyses, led NMFS to propose that these fisheries be subject to some of the regulatory measures in the proposed HPTRP.

Based upon further review and as the result of public comment, NMFS has decided to exclude fisheries with mesh size 5 inches (12.7 cm) and less from the HPTRP regulations at this time. The reasons for this are that the number of observed takes in these mesh sizes currently available in the data is limited. However, given the concerns associated with the possible bycatch from these fisheries discussed above, NMFS will reevaluate the observer and stranding data, particularly from alternative platforms, for these fisheries in the spring, 1999 and address the issue of mesh sizes 5 inches (12.7 cm) or less at that time.

Given the models and assumptions used in the subfishery bycatch analysis and the predicted effect of using the recommended gear characteristics based on small and large mesh gillnet categories, excluding the mesh sizes of 5 inches (12.7 cm) and less at this time does not change the expected 79 percent or greater reduction in harbor porpoise bycatch in the Mid-Atlantic.

In addition to the 30-day public comment period and publication of the proposed rule in the **Federal Register**, NMFS issued a press release announcing the availability of the proposed rule and summarizing the major issues in the proposed rule. The final rule will govern fishing by the NE Multispecies and Mid-Atlantic gillnet fisheries in the GOM and Mid-Atlantic. NMFS expects that implementation of this rule will reduce within 6 months of

its implementation the bycatch of harbor porpoise to below their PBR level.

### Response to Comments

#### *Comments on the Take Reduction Team Process and General Comments*

*Comment 1:* One commenter stated that each country and each region should be treated equally and be separately responsible for specified shares of PBR and bycatch reduction. This commenter noted that combining the two plans raises the issue of how NMFS will allocate PBR between the two jurisdictions in the future. Since the Mid-Atlantic accounts for only 10 percent of the mortality, this is unfair to them. Three commenters recommended keeping PBR only on a jurisdictional basis. One commenter recommended reconvening both the GOMTRT and MATRT to address the allocation issue.

*Response:* NMFS disagrees that there is an allocation problem. Each region is treated separately for respective shares of PBR. This issue was discussed in detail during the Mid-Atlantic TRT meetings. Combining the two plans into one final rule does not change the basis for the reductions accepted by the separate TRTs. Specifically, each region agreed to reduce its respective bycatch by 79 percent of the estimated level of bycatch for that region. For example, if the Mid-Atlantic region takes only an estimated 200 animals, they need to achieve a 79 percent reduction which translates to a reduction of 158 animals. If the GOM has an estimated take level of 1800 animals, they also need to achieve a 79 percent reduction, but this translates to a reduction of 1422 animals. These are equal reductions based on the respective levels of bycatch; i.e., one region is not compensating for the other. This strategy is both equitable and fair and was accepted by the GOMTRT and MATRT.

*Comment 2:* One commenter noted that the **Federal Register** publication notice for the proposed rule (63 FR 48671) indicated that Canadian sink gillnet takes are approximately 100 animals, and the HPTRP will achieve the necessary PBR reduction including the Canadian takes. The commenter asked how NMFS will incorporate fluctuations in Canadian interaction levels in the HPTRP. The commenter also asked how a higher level of lethal Canadian interactions would affect the annual HPTRP review and why an approximate count is acceptable for Canadian take whereas the total PBR estimate is a firm point estimate.

Another commenter recommended that

NMFS strongly encourage efforts to request the Department of Fisheries and Oceans (DFO), Canada, to consider the HPTRP.

*Response:* Under the MMPA, takes throughout the range of the species are considered in developing management measures in the TRPs. Since the HPTRT is expected to meet semi-annually the first year, and annually thereafter, changes in information on Canadian takes, as available, can be evaluated by the TRT at the same time U.S. bycatch information is discussed and recommendations made on all these issues at the same time. NMFS has detailed data on both bycatch in U.S. fisheries and Canadian fisheries. This allows for a more accurate estimate of total bycatch in U.S. and Canada fisheries. For Canadian takes, the U.S. receives information from the Canadian Government on bycatch in its fisheries. NMFS has already met with representatives of the Canadian government to discuss the HPTRP in U.S. waters and encourage the Canadians to participate in reducing the overall fishing mortality on this stock. As a result, Canada developed its Harbor Porpoise Conservation Plan and has implemented an observer program which has documented a continuous reduction in bycatch in their Bay of Fundy gillnet fisheries.

*Comment 3:* Five commenters asked how NMFS will incorporate the anticipated harbor porpoise conservation benefits when the FMPs for monkfish and spiny dogfish are published and the American shad intercept gillnet fishery is phased out. Another commenter noted that upcoming management plans on both dog sharks and monkfish have not been considered by NMFS in constructing the HPTRP. This commenter stated that the most obvious problem with the HPTRP is the lack of information on the restrictions proposed by the FMPs for monkfish and spiny dogfish and their anticipated conservation benefits to harbor porpoise. Another commenter criticized NMFS for not considering the protection that will be afforded under a number of FMPs, including Atlantic Sturgeon, Monkfish, Dogfish, Bluefish Amendment 1, Amendment 1 to Shad and River Herring.

*Response:* NMFS generally discussed the impacts of the proposed FMPs for monkfish and dogfish in the proposed HPTRP. NMFS did not analyze the proposed FMP management measures in detail because, during the development of the proposed HPTRP, these plans were not yet final. Given that FMPs may change significantly prior to a final vote by the responsible Fishery Management

Council (FMC), NMFS felt it unwise and impractical to guess at the final FMC recommendations. However, concurrent with the development of the HPTRP proposed rule, the Monkfish FMP was voted on and a final FMP package with a preferred alternative was submitted to NMFS on October 27, 1998, by the NEFMC and the MAFMC. The preferred alternative, now under consideration by the NEFMC and the MAFMC, will provide no benefits to harbor porpoise conservation in the near future because the regulations do not become effective until May 1, 1999. Since the HPTRP must show a reduction in bycatch within 6 months of implementation and the majority of harbor porpoise bycatch occurs during the months of January through April, the HPTRP must go into effect in early January 1999 to reduce impacts to harbor porpoise in the spring 1999 fishery.

If the Monkfish FMP goes into effect, the expected harbor porpoise conservation benefits appear to be the result of overall effort reduction through Days-At-Sea and Total Allowable Catch restrictions. However, any conservation benefits may be negated as a result of the relatively high gill net limits set by the FMP. According to the MATRT, the average number of nets employed by Mid-Atlantic fishermen is 80 nets. The Monkfish FMP, if approved, would allow fishermen to use up to 160 nets.

The biggest differences between the Monkfish FMP and the HPTRP are in the mandatory time outs. The 20-day block during April, May, and June required under the Monkfish FMP would have little additional reduction in harbor porpoise bycatch. If the fishermen take their 20-day block (under the Monkfish FMP) in early April in New Jersey, there could be a conservation benefit—but it would mirror only what is currently required in the HPTRP and would not result in any additional benefits. If the 20 days are taken in May or June in New Jersey or April through June in the southern Mid-Atlantic, there will be little if no benefit to harbor porpoise because harbor porpoise are not usually taken in those areas at those times.

Regarding the other upcoming FMP, the Dogfish FMP is still under development; therefore it is unclear what the Councils' preferred alternative is regarding that plan. NMFS believes it is premature to analyze the possible impacts of the Dogfish FMP without a preferred alternative. The other plans are still either in the development phase or will not go into effect until after the spring 1999 fishery, thereby not providing any clear benefits to harbor

porpoise in the required 6-month time frame.

As stated in the proposed rule, the HPTRP measures are expected to be reevaluated on a yearly basis. NMFS will consider any new regulations that may affect harbor porpoise or the implementation of this plan and evaluate whether management measures need to be changed at that time.

*Comment 4:* One commenter recommended that the HPTRT be convened semiannually to see if the HPTRP is meeting objectives.

*Response:* NMFS intends to reconvene the teams semiannually the first year of plan implementation in order to track the plan's progress toward the 6-month MMPA goal. Whether or not reconvening the TRTs semi-annually after that first year is necessary would depend on the circumstances.

*Comment 5:* One commenter recommended that NMFS coordinate HPTRP development with annual FMP adjustments that will occur for the Multispecies, Monkfish, and possibly Dogfish FMPs. FMP evaluation will begin in November, and recommendations will be provided to the Council every December. Any changes to plans will be submitted by the Council to NMFS by February 1 each year, with implementation on May 1.

*Response:* NMFS agrees that close coordination with the Fishery Management Councils on annual changes that will affect fisheries is a good idea. During the first year of plan implementation, the TRT will meet in the summer of 1999 to discuss the plan's progress and recommend any changes to the plan based on the spring fishery's results. In finalizing recommendations, NMFS would have the opportunity to coordinate with the Councils in the fall at the same time the Councils are considering adjustments for fishery management purposes.

*Comment 6:* One commenter recommended that NMFS should review Framework 25 to see whether there are ancillary benefits to harbor porpoise that have not been included in the proposed rule. If Framework 25 results in more positive benefits than projected, NMFS should consider reducing the 8½-month pinger requirement in the Mid-Coast area.

*Response:* Framework 25 was evaluated using the available data to determine ancillary benefits to harbor porpoise reduction. The benefits of Framework 25 were included in the analysis to determine how much additional reduction was needed from the HPTRP measures (see the EA for detailed information). When bycatch

information is reviewed for spring of 1999, further information will be available to evaluate the impacts of implementation of Framework 25 during 1997 and 1998.

The HPTRP has an overall strategy for the entire GOM that is expected to reach MMPA goals for this fishery. Individual areas cannot be viewed in a vacuum. The Mid-Coast area has made progress in reducing bycatch by using pingers. Therefore, contrary to supporting a reduction in pinger use, this fact supports the continued use of pingers so that bycatch continues to remain under control. This plan will not work if bycatch reduction achieved in one area is replaced with bycatch increases in another area because mitigation measures have been removed.

*Comment 7:* One comment supported the need for the proposed regulations and noted that the proposed regulations can work well with the FMPs developed by NEFMC and MAFMC.

*Response:* NMFS agrees.

*Comment 8:* One commenter stated that the process was inappropriately delayed and, consequently, requested an additional public comment period.

*Response:* NMFS agrees that the process experienced delays for many reasons. Significant public comment was received throughout the TRT process, including an additional meeting in December 1997 for the GOM. Addressing the harbor porpoise bycatch issue has been an ongoing process since the early 1990s, and most of the measures in the TRT draft plan from 1996 had already been put into place through framework actions implemented under the NE Multispecies FMP. While the proposed rule published in September 1998 goes beyond these measures, NMFS determined that 30 days was sufficient for additional comments, given the long history of public involvement.

*Comment 9:* Several commenters felt that because small mesh fishermen in the Mid-Atlantic were not adequately involved in the TRT process, any regulations affecting this segment of the fishery should be open to public hearings.

*Response:* NMFS disagrees that the small mesh fishermen did not have the opportunity to be represented in the MATRT. The MATRT included a number of industry representatives and state fishery management agencies. In addition, the MATRT meetings were open to the public. However, many fishermen typically using this type of gear in nearshore fisheries in the Mid-Atlantic, while present at the start of the MATRT process, did not participate



once the MATRT agreed to address only the monkfish and dogfish subfisheries.

*Comment 10:* One commenter complemented the Press Guide which explained the proposed regulations but noted that the northern and eastern boundaries of the Mudhole were in error.

*Response:* The actual chart provided in the Press Guide was correct. However, NMFS agrees that the accompanying text contained errors in the northern and eastern boundaries. NMFS will review the Press Guide and revise it based on final regulations.

*Comment 11:* One commenter requested that the analysis from the GOM pinger experiment be given to the MAFMC. The commenter stated that a consensus recommendation could be developed with the new results from the GOM experiment.

*Response:* NMFS will provide the MAFMC with the results of the 1997 pinger experiment, which can also be discussed at the next meeting of the MATRT.

*Comment 12:* One commenter stated that combining the Mid-Atlantic and GOM TRTs is not a good idea. The fisheries are not the same, and this approach would only weaken the position fishermen hold on the TRTs.

*Response:* NMFS agrees that the fisheries are different; that is why distinct strategies were maintained for each region even though both geographic areas were included in one set of regulations. The regulations would not have been different had they gone through two separate rulemaking processes. NMFS is considering whether or not the two teams should continue to meet separately or whether some or all of the meetings should be combined.

*Comment 13:* One commenter notes that the statement "the HPTRP is based in large part on recommendations in the draft GOMTRP and the MATRT report" is not accurate. NMFS has expanded the terms of the regulation so significantly that NMFS has jeopardized any future TRT discussions because participants cannot be assured that their time, deliberations, and consensus will be honored and accepted by NMFS.

*Response:* NMFS disagrees that the terms of the regulation have been expanded significantly from the two TRT recommendations. The GOM plan retained the strategy of discrete closures surrounded by larger areas of pinger use as recommended by the TRT at its December 1997 meeting. The strategy of gear modifications based on gear types that reflected locally prevailing practices in the Mid-Atlantic were retained. In both cases, some changes were made in the final regulations based

on new information and comments received during the public comment period. The TRT deliberations are integral to the process and provided valuable insight into how these issues between stakeholders might be resolved. Individual team member contributions are invaluable, and the teams are to be fully commended for persevering through a difficult process. Changes made to those recommendations reflect actions considered necessary to meet agency obligations under the law, to reflect concerns of all constituents, and to be certain that regulations are enforceable. This process is relatively new and both TRT participants and NMFS have learned ways the process can be improved. NMFS agrees that continued efforts at communication between NMFS and the teams throughout the process is necessary for the process to maintain its integrity.

*Comment 14:* One commenter questioned whether the proposed rule discusses the new information that has warranted the changes that NMFS has made from the 1997 proposed rule. The commenter stated that no conclusive information was presented at the December 16—17 meeting resulting in any consensus or recommendation from that meeting to warrant those changes.

*Response:* Recommendations did come out of the December 16—17, 1997, meeting, and they are reflected in the GOMTRT's report of January 14, 1998. NMFS agreed with many of the GOMTRT's recommendations, and the proposed rule (September 11, 1998) incorporated most of the Team's recommendations. NMFS agrees that this was not a consensus report. The August 1997 proposed GOMTRP provided for a variety of measures, including requirements for fishery closures and closures with pingers aimed at harbor porpoise protection that were ultimately implemented under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The 1996 bycatch data revealed that these measures were ineffective at reducing overall bycatch, and, based on this new information, NMFS concluded that the changes to the original proposed GOMTRP were warranted. These data and historical management measures are discussed in detail in the EA.

*Comment 15:* One commenter stated that there is confusion because some areas are closed for both groundfish conservation and harbor porpoise protection. In some areas that are closed for harbor porpoise protection only, fishing with gillnets is permitted with approved pingers. This distinction between areas closed for harbor

porpoise conservation and areas closed for groundfish conservation should be clearly articulated as a matter of general policy in the final rule. This would obviate the need to initiate a framework adjustment each time a groundfish conservation closure was shifted or lifted if it occurred in an area also closed for harbor porpoise protection.

*Response:* Since the harbor porpoise regulations are promulgated under the MMPA, the regulations will remain in effect regardless of shifts in groundfish closures under the Magnuson-Stevens Act. However, the effects of changes in groundfish closures on the effectiveness of the HPTRP would need to be reviewed and changes made to the plan, if appropriate, to retain its effectiveness.

*Comment 16:* One commenter recommended including a definition of baitnets in the rule.

*Response:* A description of baitnets is provided in the regulations for the NE Multispecies FMP (50 CFR § 648.81 (f)(2)(ii)) as "a single pelagic gillnet, not longer than 300 feet (91.44 m) and not greater than 6 ft (1.83 m) deep, with a maximum mesh size of 3 inches (7.62 cm), provided that the net is attached to the boat and fished in the upper two thirds of the water column, the net is marked, there is no retention of regulated species, and there is no other gear onboard capable of catching NE multispecies." The HPTRP regulations include an exception for single pelagic gillnets or baitnets.

*Comment 17:* One commenter noted that the capture of harbor porpoise in mid-water trawl fisheries has not been adequately addressed within the proposed rule. The commenter stated that the mid-water trawl fishery for Atlantic herring represents the biggest increase in fishing effort and is classified as a Category II fishery. The efforts of reducing bycatch through gillnet regulations could be negated if no regulatory action is implemented for the mid-water trawl fishery for Atlantic herring.

*Response:* NMFS agrees that the mid-water trawl fishery for Atlantic herring has the potential to take small cetaceans. In the proposed List of Fisheries for 1999, the GOM and Mid-Atlantic herring mid-water trawl fishery are proposed as Category II, based on comparisons with other gear types known to take several species of small cetaceans and the fact that herring are an important prey item for several stocks of marine mammals. However, NMFS currently has no observed takes of harbor porpoise in this fishery, and consequently it is not included in the final HPTRP. Monitoring will continue through the Sea Sampling Observer

Program at a level consistent with the valid sampling scheme currently used by the program.

*Comment 18:* One commenter expressed reservations about NMFS' intent to implement the five stated non-regulatory measures recommended by the GOMTRT at its December 1997 meeting. The study to evaluate habituation and displacement has been concluded, and the results should be published. A census of the gillnet fleet should be readily available through existing reporting requirements. The commenter also felt that there has been sufficient time for NMFS to investigate options for providing support to fishermen for pinger technology. The commenter questioned why these issues are not addressed with the proposed rule. The commenter noted that NMFS will need to have a pinger training course available at all times so as not to prevent potential fishermen access into the gillnet fishery.

*Response:* One study to evaluate habituation and displacement took place during the summer of 1998, but a final report was not available at the time of the proposed rule. Results of this study will be published as soon as possible. The implications of this study for the HPTRP will be discussed at the next meeting of the TRTs in 1999.

A census of the gillnet fleet using existing reporting measures is expected to occur in the near future. When the census is complete, the results will be reported.

NMFS has investigated the potential for support for fishermen to purchase pingers but no viable options are available at this time.

The certification program for fishermen using pingers is expected to be available as needed.

*Comment 19:* One commenter suggested that NMFS track harbor porpoise by radar to alert fishermen and thereby give fishermen the opportunity to move nets. Another commenter suggested daily tracking of harbor porpoise to regulate fishing that day.

*Response:* Given current technologies, it would not be feasible for harbor porpoise to be tracked by radar. Radar tracking poses significant difficulties with small cetaceans, both technically and practically. Additionally, because of the nature of the gillnet fishery, it would be impractical for fishermen to retrieve their nets when harbor porpoise are in the area without significantly reducing their catch. Daily regulations of fishing would be nearly impossible to administer and impractical for fishermen to comply with.

*Comment 20:* One commenter suggested making the gillnets smaller.

*Response:* If the comment refers to the actual size of the deployed nets, this approach is part of the reasoning behind the reduced floatline lengths in the Mid-Atlantic component of the HPTRP.

*Comment 21:* One commenter suggested that fishermen should not be allowed to fish in the same area where harbor porpoise eat.

*Response:* Although the NE multispecies and Mid-Atlantic fisheries are not necessarily targeting harbor porpoise prey, they do use many of the same feeding areas as harbor porpoise. Since restricting fishing away from areas of harbor porpoise feeding would severely restrict fishing opportunity and because it is unclear exactly where and if harbor porpoise feed on a regular basis, the intent of the pinger requirements is to allow fishermen to be in the same general area as harbor porpoise while minimizing interactions.

*Comment 22:* One commenter suggested closing certain areas to fishermen, particularly during harbor porpoise mating seasons. Another commenter suggested generally implementing special fishing times.

*Response:* The intention of the HPTRP is to close certain areas to fishing during times of high bycatch, i.e., when chances of interaction between harbor porpoise and gillnet fisheries are high. However, because all areas cannot be closed if a viable fishery is to exist, fishing during times and areas adjacent to closures can only be allowed if pingers are used.

*Comment 23:* One commenter recommended that no fishing be allowed when harbor porpoise are in Maine.

*Response:* The HPTRP closed the NE area, in Maine, from August 15 to September 13, the time period when harbor porpoise are most common in Maine waters.

*Comment 24:* One commenter recommended that the MMPA and ESA be strengthened.

*Response:* NMFS will reevaluate the effectiveness of the HPTRP management measures and the effectiveness of the MMPA to achieve harbor porpoise conservation in 1999. NMFS will not reevaluate the ESA with regard to TRPs because NMFS regards the MMPA measures sufficient for conservation of harbor porpoise.

*Comment 25:* One commenter suggested that NMFS list harbor porpoise as threatened.

*Response:* In 1993, NMFS proposed listing the harbor porpoise as threatened under the ESA in response to a petition by Sierra Club Legal Defense Fund on behalf of 13 other organizations. NMFS' research findings at that time indicated

that the rate of bycatch of harbor porpoise in gillnet fisheries might reduce the population to the point where it would become threatened and that the regulatory measures in place to reduce this bycatch were inadequate. NMFS has not yet issued a final listing determination. New data, new regulations, and this rule to implement the HPTRP provide substantial new information for consideration by NMFS and the public. The proposed rule to list the GOM harbor porpoise as threatened under the ESA was reopened for public comment on October 22, 1998. The public comment period closed on November 23, 1998. NMFS plans to make a listing determination in the near future based on the new information and public comment on the proposed rule.

#### Comments on Data and Research

*Comment 26:* One commenter recommended that the PBR formula be re-assessed during the next re-authorization of the MMPA because the default safety parameters in the model are inaccurate and contrary to the available science, which indicates that harbor porpoise have an extremely short life span, early maturation, and a very high, successful reproductive rate, compared to other odontocete species.

*Response:* NMFS is unaware of new scientific information that could be used to re-assess the default parameters. Any new, valid scientific information would be welcome, evaluated, and incorporated, as appropriate, into these assessments. However, in the absence of other information, the default model parameters used in the PBR formula represent the best available scientific information on this topic. The life history of harbor porpoise, among other related issues, was discussed in length at a meeting in 1996, the results of which are published by Wade and Angliss, 1997, in "Guidelines for assessing marine mammal stocks: report of the GAMMS workshop April 3-5, 1996, Seattle Washington." A peer-reviewed scientific article that describes some of the work that went into defining the parameters is summarized by Wade, 1998, in "Calculating limits to the allowable human-caused mortality of cetaceans and pinnipeds."

*Comment 27:* One commenter noted that the PBR level based on population dynamics continues to be ultraconservative and asked if NMFS considered a peer-review debate on choosing to use this conservative reproductive estimate. Many scientists feel that this may be too conservative.

*Response:* NMFS has used peer reviewed information to choose the

population dynamic parameters in the evaluation of the PBR calculation. See comment number 26 for references to the peer-reviewed work in this area.

*Comment 28:* One commenter expressed concern about methods used to estimate harbor porpoise bycatch because calculations are based on takes per haul as the unit of effort and not the number of takes per net. This commenter also expressed concern about weighout landings as the multiplier and recommended a review of this process for an alternative with more precision. Another commenter stated that NMFS is unwilling and unable to correct and adjust estimates of fleet size and methods of extrapolation used to determine effort and that NMFS has never had reliable fleet size information to measure effort. A third commenter stated that NMFS' bycatch calculations, based on what the gillnet fishery catches, are incorrect. This commenter noted that, despite continuous requests to adjust this approach to a more practical and realistic method, NMFS continues to do it the wrong way. This commenter recommended that units of fishing effort are more appropriate means of calculating and estimating harbor porpoise bycatch.

*Response:* The current method used to estimate harbor porpoise bycatch does not rely on fleet size. Therefore, obtaining the most up-to-date estimates of fleet size would not change the bycatch estimate.

Choosing the most appropriate unit of effort for the bycatch estimate is a two-step process, and both steps must be accurate and reliable before another unit of effort can be used. Step one is choosing the best unit of effort using the Sea Sampling data, and step two is calculating that unit of effort for the entire fishery.

By definition, the most appropriate theoretical unit of "effort" needed in any bycatch estimate is a unit of "effort" that is expected to relate directly to the number of harbor porpoise that are caught and to increase proportionally as the number of harbor porpoise takes increase. Therefore, even on a theoretical basis, that unit of "effort" does not have to be a unit that is typically thought of as fishing effort, such as days fished or number of boats. Other possible acceptable units of "effort" could be hours nets are soaked multiplied by the number of nets, or pounds of fish species "X" caught in the net. Again, for the areas and times when there are both harbor porpoise and fishing, what is needed is a unit such that as the level of that unit increases so

does the number of caught harbor porpoise.

After that unit is chosen, it is essential that NMFS estimate the total amount of that unit for the entire fishery. So, for example, if hours of net soak time represented the best unit of "effort" then it would be necessary to calculate the total number of hours soaked by all nets used by the entire fishery, by the time and areas that are appropriate. Data in the fisher trip logbooks could be used to calculate this information. However, even in 1997, many of the data fields in the logbooks were left blank. Until the logbooks are completely and accurately filled out all of the time, it is impossible to use net soak time to calculate the total level of "effort."

NMFS is willing to investigate other possible units of "effort" but, until the total amount of a unit for the whole fishery is available and accurate, it is not possible to use any other unit of "effort" except that already being used—tons of fish landed from the dealers.

*Comment 29:* Two commenters asked how there could be insufficient data to determine population trends for this species, but enough information to determine a specific PBR point estimate.

*Response:* By definition, PBR requires one abundance estimate and the level of confidence associated with that estimate. This information is available, so PBR can be calculated. However, determining population trends require several abundance estimates within a long time series. At present we have three abundance estimates taken during 5 years (1991, 1992, and 1995). Three abundance estimates with Coefficient of Variation's in the 20 percent range during such a short time period are not sufficient to accurately determine if there is a trend. However, another abundance survey is scheduled for the summer of 1999. The NEFSC is intending to use the four abundance estimates (1991, 1992, 1995, and 1999) taken from the resulting 9 years (1991–1999) to investigate whether a trend can be determined and the level of accuracy of that conclusion.

*Comment 30:* One commenter noted that the proposed rule stated that the Assistant Administrator will review, on an annual basis, the effort and bycatch data to see if the HPTRP is achieving the PBR goal. The commenter then drew the conclusion that, if the HPTRP is effective, the number of harbor porpoise should increase each year. NMFS indicated in that same rule that sufficient data are not currently available to determine trends in harbor porpoise stock size. The commenter then asked that the harbor porpoise

stock size be assessed to see if it does increase with TRP efforts.

*Response:* Harbor porpoise stock size will continue to be assessed by conducting sighting surveys every few years. There is a survey scheduled for the summer of 1999. The frequency of future surveys will be determined by considering the level of accuracy of each individual estimate and the need to get accurate abundance estimates of all marine mammals found in U.S. waters. At the present time, it has been suggested that conducting surveys every 4 years would be adequate.

The HPTRP will be assessed by monitoring the level of by-catch. This monitoring program will be on a quarterly basis, at least for the next few years.

*Comment 31:* One commenter requested that NMFS undertake research on pingers to evaluate displacement and habituation of harbor porpoise, and long-term effects of pinger use on the ecosystem.

*Response:* Research has started on this topic and will be continuing. Specifically, during the summer of 1998, research was conducted that investigated the small-scale distribution and relative abundance of harbor porpoise near and around pingers and herring weirs. This project will provide information on displacement and short-term habituation (on a monthly scale). Another project will be conducted during January to May 1999 and will investigate displacement, short-term habituation, and short-term effects on the ecosystem. This project will involve monitoring the spatial distribution and relative abundance of harbor porpoise, other marine mammals, herring, and other fish in areas and times with and without pingers.

*Comment 32:* One commenter stated that the plan appears to contain a number of discrepancies between some numbers in the tables and text of the EA that call into question the rigor of the underlying assumptions of reductions in mortality; for example, mortality reductions calculated based on use of pingers in areas or times where pinger use is not required.

*Response:* NMFS has thoroughly reviewed the calculations in the draft EA with respect to the final rule and has updated the EA. Some of the confusion is a result of the complexity of the data and of the difficulties in its presentation, rather than actual errors. The shaded area in Table 4 of the draft EA represents areas where reductions can be made, not necessarily those made by the HPTRP. Discrepancies between the text and the charts have been re-evaluated and corrections made

as appropriate in the final EA. NMFS disagrees that the discrepancies call into question the rigor of the underlying assumptions of reductions in mortality. The discrepancies were relative to 1994 and 1995 data that were not available in the 1996 data format, and consequently the estimates of reduction were less accurate. The impact of Framework 25 could not be incorporated. Because of the nature of available data, calculations of plan effectiveness on years prior to 1996 were not as accurate. These data are provided at the request of many GOMTRT members for comparison purposes, but the 1996 data, with the analysis of Framework 25, are primarily what are used to support the conclusion this plan will reach its goal.

*Comment 33:* One commenter challenges the information that establishes the PBR of 483 animals although specifics were not given.

*Response:* The value of the PBR for the Gulf of Maine/Bay of Fundy harbor porpoise has been accepted by the Atlantic Scientific Review Group. This is a group of non-government scientists that were formed under the MMPA and whose purpose is to review, correct, and monitor the data going into the assessments of all the marine mammals (see also response to comment 26).

*Comment 34:* The commenter stated that their understanding was that the bycatch information reflected in the proposed rule was based on a "5 year (1990–1995) average mortality estimate" and then questioned how NMFS can justify the expansion of regulatory conditions without current information, i.e., later than 1995.

*Response:* Information used to evaluate the proposed regulation was the most recent available at the time, through 1996 verified and complete, and initial estimates for spring of 1997. Therefore, data more recent than 1995 were used. Secondly, the impact of the proposed regulations were evaluated with respect to the most recent fishery management measures, including Framework 25 to the NE Multispecies FMP. The average referenced in the preamble was solely to illustrate the trend over the years of available data; it was not used to justify any regulatory components of the plan, the most recent complete data was used (1996). The years 1994 and 1995 were also provided for comparison.

*Comment 35:* One commenter suggested that it is time to think about opening up some of the closure areas with pinger use now, not expanding them. The commenter stated that effort and migration does not necessarily equal entanglement due to absence or presence of feed fish and that this was

accepted by the NEFMC in deciding the appropriate closure for Massachusetts Bay.

*Response:* Clearly the Massachusetts Bay Closure was not effective because bycatch occurred just outside the closure time/areas. Fishing effort and the presence of harbor porpoise does increase the probability of entanglement. NMFS agrees that there is inter-annual variability in porpoise distribution often based on prey distribution; however, that justifies, not contradicts, the strategy for expanded pinger times and areas.

*Comment 36:* One commenter recommended expanding the observer program to ensure accurate bycatch estimates under the new management regime.

*Response:* When applying observer coverage under the new management regime, NMFS attempts to insure the best possible, unbiased, and accurate harbor porpoise bycatch estimate, given available resources and recognizing the need for accurate information on other marine mammal stocks. This is just one component of an overall fishery observer program.

*Comment 37:* One commenter recommended that NMFS provide the GOMTRT with a detailed description of its planned scientific research and request its comments on those studies.

*Response:* NMFS will provide descriptions of planned research to the GOMTRT and consider comments as appropriate.

*Comment 38:* For the Mid-Atlantic, three commenters felt that despite substantial fishery-dependent observer data for other gillnet fisheries which indicate little or no harbor porpoise interaction and the recommendation by the MATRT which focused only on monkfish and dogfish fisheries, NMFS has unfairly expanded the HPTRP to include all fishing with gillnets in inshore and offshore waters of the Mid-Atlantic. One commenter felt that the small mesh gillnet fishery should have a minimum mesh size limit of 5 inches.

*Response:* NMFS agrees that during the deliberations of the MATRT, the Team focused its recommendations on subfisheries rather than all Mid-Atlantic gillnet fisheries, as defined in the List of Fisheries. The MATRT was warned, however, that analysis of bycatch data by subfisheries under the constraints of limited sample sizes required highly speculative assumptions. Due to this factor as well as enforcement concerns and the lack of FMPs for those fisheries, NMFS expanded the definition of Mid-Atlantic fisheries covered by the HPTRP to large and small mesh fisheries.

However, NMFS has excluded mesh sizes of 5 inches (12.7 cm) and less from the small mesh regulations at this time. The reasons for this is the limited number of observed takes in these mesh sizes currently available in the data and because the fishermen typically using this gear in the nearshore Mid-Atlantic fishery, while present at the start of the TRT process, did not participate once the TRT agreed to address only the monkfish and dogfish subfisheries. This does not mean the evidence of potential interactions in this sector of the gillnet fishery will be ignored. Although the number of observed takes in mesh sizes of 5 inches (12.7 cm) or less is small, takes have been documented that were not "dogfish-targeted" trips. There were 3 takes in the menhaden fishery in 1997 in New Jersey and there was a take in the southern Mid-Atlantic shad fishery in 1996. Therefore it is likely that takes do occur in small mesh fisheries. Given this concern, NMFS will reevaluate the observer data (particularly through the expanded observer program and alternative platforms) and stranding data for these fisheries in the spring, 1999, and reconsider if management measures to reduce bycatch are needed.

*Comment 39:* One commenter stated that NMFS made assumptions about bycatch in the Mid-Atlantic that are erroneous. The EA specifies that it was assumed that no mortality occurred in fisheries other than those for monkfish and dogfish, which is incorrect. The EA also assumed that no porpoise can ever be caught in waters off Virginia and Delaware, which is unlikely based on co-occurrence of animals and gillnet fisheries in those areas.

*Response:* NMFS agrees that harbor porpoise mortalities occur in fisheries other than monkfish and dogfish. The assumptions alluded to are just some of a number of assumptions that were made in order to provide the models that could evaluate specific gear parameters for bycatch reduction potential for the MATRT meetings. The regulations themselves address small and large mesh gillnet fisheries with specified parameters and do not exclude Virginia and Delaware.

*Comment 40:* One commenter recommended that NMFS reexamine the validity and accuracy of its bycatch estimates in the Mid-Atlantic in light of unlikely assumptions, incomplete observer coverage in the past and available information on bycatch levels for 1997. The commenter recommended that if bycatch estimates are determined to be higher than those assumed in the proposed measures, the proposed time/area closures should be expanded to account for additional bycatch.

*Response:* The final regulations cover nearly the entire time and areas where the 1997 takes occurred. The rule includes times and areas where the observer coverage in the past was low. Observer coverage will be provided in the Mid-Atlantic at appropriate levels to evaluate whether or not the plan is meeting its goals. After HPTRP implementation, bycatch estimates will be reviewed; if they are higher than expected, NMFS and the TRTs will need to discuss what further measures might be necessary.

*Comments on Pingers: Specifications, Options, Implementation Issues*

*Comment 41:* One commenter stated that pingers are not the only option in the Gulf of Maine. In the Mid-Atlantic, it has been proven that the use of heavier gauge monofilament prevents mammal takes in gillnets. Many fishermen in southern New England are already using heavier gauge twine. Those fishermen should have the same option as the Mid-Atlantic fishermen and NMFS should review the data and present them to the TRT.

*Response:* Data reviewed by the MATRT on harbor porpoise takes in gillnet sets using heavier gauge monofilament appear to show a difference in the level of harbor porpoise takes when compared to finer twine sizes in sets for monkfish and dogfish. Most of the observed sets evaluated in these data were from NJ south. Data has not been analyzed for these gear options in the Gulf of Maine and they were not considered as a bycatch reduction option by the GOMTRT. In addition, because of the level of data available, and the assumptions necessary to model these variables, NMFS does not want to expand this mitigation measure to a much larger geographic area. In addition, NMFS has developed these regional strategies based on TRT recommendations. The majority of the New England fishery is diverse and no correlations in the data for gear parameters were apparent to TRT members; consequently they chose to use a tested take reduction strategy, i.e., pingers. As with many fishery management measures, lines are drawn to identify where measures change. While it is true that fisheries adjacent to but divided by such a management line may show more similarity than with fisheries within their appropriate sector, the line chosen represents the point where an overall change in the fishery occurs.

Discussion in the MATRT with respect to pingers as a management option was rejected for some of the same

reasons that gear modifications were not applied in the GOM. While pingers have shown success in experimentation, they have not been evaluated ("proven") under widespread use. In addition, pingers are not passive and other environmental effects are yet to be evaluated. Harbor porpoise may also behave differently while in the southern portion of their range. With regard to experimentation with pingers, the character of the fishery is much different in the Mid-Atlantic, being more spread out than in the Gulf of Maine. Therefore, an experiment in the Mid-Atlantic would have to be of such magnitude that the cost and years of effort do not seem justified when other options (gear modifications) that have not been tested are available. Therefore, the precautionary approach justifies limiting these two strategies geographically until further data are available. In the future, based on the results of implementation of the HPTRP, NMFS will consider, in conjunction with the advice of the TRT, whether other strategies are viable for either the GOM or the Mid-Atlantic. NMFS will analyze available data from the southern New England area and provide that information for review at the next meeting of the TRT.

*Comment 42:* One commenter recommended that NMFS should require that vessels carry four spare pingers in the event that there is a pinger malfunction. NMFS' own observer data does not support that fishermen are diligently maintaining their pingers, but instead indicates that in actual use, pinger effectiveness levels are significantly less than those in controlled experiments.

*Response:* NMFS disagrees and maintains its position that both manufacturers and fishermen will be aware of the importance of technically correct and properly maintained pingers. This is one of the primary objectives of the pinger certification training and outreach program, which began in September 1998 and will continue, as needed, after implementation of the final rule. Under the HPTRP certification is mandatory, as was recommended by the GOMTRT, for the very reason of removing some of the uncertainty surrounding the results of the experimental fisheries. Since this type of outreach was not in place for the experimental fisheries, the results of future commercial use of pingers are expected to be more positive. In addition, the results of the Pacific TRP are now available, which show high effectiveness of pingers under commercial conditions; that plan also incorporated a strategy of mandatory

skipper education workshops which is partially credited for the success.

*Comment 43:* One commenter objected to rigid specifications for pingers as proposed in the rule, because it limits future pinger development. The concerns about the frequency of 10 kHz are about limited availability from a single manufacturer and that the specified frequency is within seal hearing range and acts as a "dinner bell" for seals in the area of the gillnets. Concern was also expressed that the specified decibel range (132 dB) limits development of a stronger pinger that may require less pingers on the net which would decrease costs to fishermen.

*Response:* NMFS recognizes that the current specifications may limit somewhat technological development on pingers. However, the pinger specifications need to remain limited during the first year of plan implementation. The only pinger for which there is currently sufficient scientific documentation regarding effectiveness in the GOM for harbor porpoise is the one specified in this rule. The best approach at this time is to implement this plan with tested technology and then entertain ideas on improving that technology or investigating different options after the plan meets its initial goal.

*Comment 44:* One commenter recommended that NMFS evaluate the pinger (PDM[PICE]) which has been tested in Europe and possibly incorporate its specifications. Another commenter stated that although the European pinger may be technically superior to the Dukane unit its sonic profile is very different from that of the Dukane pinger and, as such, would not be approved under the specifications in the proposed rule. This commenter urged NMFS to approve the use of pingers with the sonic output specifications of the European unit. In addition, NMFS should undertake focused experiments to develop a range of approved sonic profiles.

*Response:* While NMFS agrees that eventually pinger specifications may need to be revised based on new technology, new pinger specifications are not incorporated into this final rule (see response to previous comment 43).

*Comment 45:* One commenter recommended that NMFS examine all experience to date in use of pingers by fishermen, adopt a more conservative approach to reflect uncertainties and reality, and after the first year of the HPTRP reexamine the assumed rate of effectiveness based on observed bycatch rates. Another commenter stated that bycatch and bycatch reductions should

be projected using a realistic estimate of pinger effectiveness by time and area, relying on NMFS data rather than an optimistic region-wide estimate of 80 percent effectiveness. These two commenters, in general, felt that pingers are projected to be more efficient in reducing bycatch than data can support.

*Response:* NMFS has examined all experience to date in the use of pingers by fishermen in the GOM. The results of the two scientific experiments conducted in the fall of 1994 and in spring of 1997 were between 80 percent to 100 percent effectiveness. NMFS data indicate that for experimental fisheries in some times and areas, pinger efficiency was greater than 80 percent while in other times and areas the efficiency was less than 80 percent. The EA details the specifics on each of the experiments and experimental fisheries. The spring 1997 experiment was conducted based on GOMTRT recommendations, primarily because of the discrepancy in the results of various experimental fisheries, in order to remove the uncertainty over the technology's effectiveness. The TRT recommended in both the draft GOMTRP (August 1996) and at the subsequent GOMTRT meeting in December, 1997, that in order to avoid any reduction in effectiveness during commercial fishing conditions, training of fishermen should be mandatory. Certification of fishermen is occurring and is expected to remove problems with improper use and maintenance that may have caused disparate results in the experimental fisheries. The data currently support the choice of an average region-wide 80 percent efficiency, based on controlled experimental results, but allowing for some discrepancy in levels of effectiveness under actual fishing conditions.

*Comment 46:* One commenter recommended that because bycatch estimates will go up if a more conservative pinger effectiveness estimate is used, and because NMFS has not fully accounted for effort displacement outside of time/area management zones, NMFS should adopt a blanket provision that requires all gillnets in New England be equipped with pingers except at those times when, and in those areas where, harbor porpoise are highly unlikely to occur (e.g., Massachusetts Bay or Cape Cod South from June 1 to Sept 15).

*Response:* NMFS agrees that inter-annual variability in both fishing effort and harbor porpoise distribution has been a problem for bycatch reduction strategies. However, NMFS has chosen its strategy (discrete areas of pinger use)

with respect to pinger requirements for several reasons. Pingers have not been used in widespread application and a number of questions remain such as overall environmental effects and habituation and displacement of harbor porpoise or other species. The times and area are currently large enough to demonstrate, based on available data, that the plan will reach its goal without the additional burden on the fishery that such a blanket provision would entail. Should monitoring reveal that bycatch indeed shifts to areas outside the closures and should research provide answers to address these remaining questions, complete implementation of pingers in the fishery would be considered along with other options.

*Comments on the Gulf of Maine Component—Proposed Schedule of Closures and Pinger Use*

*Comment 47:* One commenter stated that in general, closures are insufficient in time and space.

*Response:* Detailed responses to comments on time/area closures are provided in later comment responses. The EA analyzes the current plan based on available data. NMFS has determined that the plan will reach MMPA goals.

*Comment 48:* One commenter stated that Framework 25 will provide greater harbor porpoise conservation than considered by NMFS. This includes the 12-month closure and the rolling closures.

*Response:* NMFS did evaluate the additional bycatch reduction that would be achieved by Framework 25 (see Table 4 in the final EA and text of the final EA) and concluded that Framework 25 measures amounted to about a 46 percent reduction in bycatch before accounting for bycatch reduction from MMPA harbor porpoise measures. This reduction was considered together with the HPTRP expected reductions to estimate the overall bycatch reduction based on data for 1996.

*Comment 49:* One commenter stated that NMFS has failed to analyze the benefits of a number of measures under Amendment 7. For example, NMFS failed to consider the benefits to harbor porpoise of the net restrictions under Amendment 7 and the limits on directed catches of cod which further reduce the number of nets deployed by the gillnet sector. The cod catch limit was further reduced in Framework 25 which has resulted in reduced number of nets deployed. Also the Days-At-Sea restrictions have taken a lot of effort out of the fishery. These and other fishery management measures have resulted in substantial reductions in gillnet fishing effort which translate into lower

probability of harbor porpoise interactions.

*Response:* NMFS now has 1997 data available which indicate that these measures have had no effect on the total bycatch of harbor porpoise in the GOM, although the distribution of takes geographically has shown interannual variability.

*Comment 50:* One commenter stated that there is no consistency within the regulation or the explained rationale to support the differences in regulations among areas. For example, the Mid-Coast is closed for seven plus months except for pinger use and the Northeast is only closed for 28 days. They are geographically adjacent. The commenter also questioned why there is only a four month regulatory condition in the Massachusetts Bay area and stated that NMFS does not account for the seasonal variability in the areas occupied by transiting harbor porpoise and fails to recognize the value of dynamic management.

*Response:* The regulations were developed based on GOMTRT recommendations and existing data. The areas are not managed the same because harbor porpoise bycatch varies between areas. Therefore, different measures are appropriate for different areas and the GOMTRT agreed with this approach. The Massachusetts Bay closure is longer than four months; it has been extended in the final regulation to include the months of December and January. This change is discussed in detail under comment number 60. As discussed during the GOMTRT deliberations, the strategy of small discrete complete closures surrounded by longer time/area closures where pingers are required was developed to account for the inter-annual variability in distribution of harbor porpoise and changes in fishing effort.

*Comment 51:* One commenter noted with approval that take reduction goals for the Northeast and Mid-Coast areas are already being met by measures currently in place and that no further restrictions are being proposed.

*Response:* Bycatch reduction has occurred within discrete closure areas, but the data show that bycatch overall has remained the same, most likely due to shifted fishing effort and inter-annual variability in harbor porpoise distribution. Therefore, these areas need to continue to achieve the same amount of bycatch reduction and the bycatch that has shifted elsewhere must be dealt with through other bycatch reduction measures as provided in the regulations.

*Comments on the Gulf of Maine Component—Area-Specific Measures*

*Comment 52:* One commenter supported maintaining the closure of the Northeast area for August 15 through September 15, citing its effectiveness.

*Response:* NMFS agrees and the Northeast Closure will remain in effect.

*Comment 53:* Two commenters requested that the plan maintain the spring (March 25 through April 25) NEFMC harbor porpoise closure in the Mid-Coast area. In addition, the commenter recommended amending the HPTRP to include a time and area closure specifically to protect harbor porpoise in the Mid-Coast during May and June because the rolling closure would not be effective during those months for reducing harbor porpoise bycatch. Another commenter recommended a complete closure during March and April.

*Response:* The Mid-Coast area has historically had high fishing effort and high harbor porpoise bycatch. This area was one of the first areas affected by efforts of the NEFMC to reduce harbor porpoise bycatch as a result of the NE Multispecies FMP. However, the limited one-month closure March 25 through April 25 was ineffective at reducing bycatch overall because it simply shifted fishing effort to other months and areas outside the closure where bycatch increased. Fishermen from this area are to be commended on efforts to develop mitigation measures for harbor porpoise bycatch and have been instrumental in development and experimentation with pingers as a management option. In fact, bycatch overall in the Mid-Coast area has decreased since 1994. Pingers have shown a very high effectiveness rate in the Mid-Coast in scientific experiments in both spring (1997) and fall (1994), although experimental fisheries in spring have shown mixed success. Harbor porpoise distribution and abundance as well as fishing effort show inter-annual variability. However, because Framework 25 provides for periods of complete closures in portions of the Mid-Coast area in the months of April, May and June and with the addition of the extensive pinger requirements under the HPTRP, a complete closure of the entire area during March and April is not considered necessary. The overall HPTRP strategy for the GOM is a series of short, discrete, complete closures in combination with much larger time/area closures where pinger use would be allowed to account for the changes in harbor porpoise and fishing effort that

may shift bycatch elsewhere. The strategy for the Mid-Coast, including requirements for pingers under the MMPA, and closures under the Magnuson-Stevens Act are expected to achieve adequate results without additional closures.

*Comment 54:* Many commenters recommended adopting Framework 25 closures as harbor porpoise closures under MMPA. One commenter specifically suggested that it was inappropriate to rely on NEFMC groundfish closures to provide harbor porpoise protection. If the NEFMC makes any shifts or lifts closures the resulting harbor porpoise bycatch reduction is lost. Consequently, these same closures should be adopted under the MMPA regulations.

*Response:* NMFS recognizes its responsibility to protect harbor porpoise, but disagrees that these efforts need to be restricted to MMPA regulations if measures in effect under other statutes will help to achieve that goal. The NEFMC has as a stated objective in the NE multispecies FMP under Magnuson-Stevens Act that it must reduce the bycatch of harbor porpoise in this fishery and as such are also mandated to achieve bycatch reduction in this fishery. Adding additional closures in the Mid-Coast area on top of the Framework 25 Multispecies closures would create an undue burden on one segment of the fishery when the bycatch reduction for the plan overall meets MMPA objectives without such an action.

*Comment 55:* One commenter recommended closure of the entire Mid-Coast area (including Inshore areas II, III, IV under Framework 25) from March 25 through May 31. This commenter suggested that fishermen will just move from Area III to Area II, for example, and there would consequently be no net bycatch reduction.

*Response:* As noted above, the overall HPTRP strategy for the GOM is a series of short, discrete, complete closures in combination with much larger time/area closures where pinger use would be allowed. This is specifically to compensate for the inter-annual variability of both harbor porpoise and fishing effort that may shift bycatch elsewhere. Simply closing the entire Mid-Coast area from March 25 through May 31 would have the same inherent problems as the closures that have been in place under the Magnuson-Stevens Act for several years. Fishing effort would likely concentrate in January through March 24 or move just outside the Mid-Coast boundaries or into the Offshore area. NMFS disagrees that no net bycatch reduction will result from

the proposed strategy because pingers are required in all of the months not covered by closure under Framework 25 surrounding the Area II, III, and IV closure months. Pingers were accepted by the GOMTRT as a viable bycatch reduction management alternative to time/area closures.

Closing the entire Mid-coast area would have an economic impact to the gillnet fleet would be \$170,000 dollars in foregone revenue and it would impact 26 vessels. This is in addition to those costs already estimated for the Mid-Coast area. Given the extensive pinger requirement and a series of closures of Inshore Areas I through IV in Framework 25, a March 25 through May 31 closure is unwarranted.

*Comment 56:* Many commenters recommended extending the Mid-Coast Closure Area to include closure of Areas II and III for the months of April and May.

*Response:* See response to comment 53. This closure would cost the fleet \$116 thousand dollars in foregone revenue and would affect 23 vessels. The overall plan is expected to reach MMPA goals without additional complete closures that exact such a cost to the fleet. NMFS has concluded that such a closure is currently unjustified.

*Comment 57:* One commenter recommended that the Mid-Coast be closed from September 15 through March 25 except for vessels using pingers.

*Response:* The Mid-Coast is closed in the final rule to vessels except those fishing with pingers from September 15 through May 31.

*Comment 58:* One commenter noted that the GOMTRT agreed there was a need to extend the boundary of Mid-Coast to the south to include a portion of Massachusetts Bay in the Mid-Coast closure area because of displacement.

*Response:* NMFS agrees that the GOMTRT discussed the need for dealing with the displaced fishing effort during the Mid-Coast closure period, March 25 through April 25, which in past years appears to have partially shifted into northern Massachusetts Bay. The final HPTRP extended the closure period in Massachusetts Bay when pingers are required to include the months of December through May. The HPTRP is based on an overall bycatch reduction scenario that is intended to spread the bycatch reduction effort throughout the fishery where bycatch occurs. This means that a bycatch reduction measure is in place (although not a complete closure) during the time period effort shifts might occur. Additionally Framework 25 closes the area from March 1 through March 31, the period



previously closed for harbor porpoise protection under the Magnuson-Stevens Act. Allowing the use of pingers in the Mid-Coast, instead of prohibiting them from the area, allows fishermen to fish, making it less attractive and/or necessary to travel to the southern border to escape the closure. Therefore, the need to address bycatch in the northern portion of Massachusetts Bay is covered as part of the overall HPTRP strategy.

*Comment 59:* One commenter noted that the current proposal was beyond GOMTRT consensus and reasonable justification for pinger use in the Mid-Coast area. Instead, the commenter recommended pingers be required March 25 through April 25, October 1 through December 31, and that no complete closures be included.

*Response:* NMFS agrees that these measures are beyond the GOMTRT's recommended consensus plan as submitted in August, 1996. However, these measures were based, in part, on the recommendations of GOMTRT members at an additional meeting that was held in 1997. Since the GOMTRT's proposed plan was very similar to the closures in effect under the Magnuson-Stevens Act, both NMFS and many GOMTRT members concluded that the plan as originally proposed would not bring bycatch to below PBR as required by the MMPA. Therefore, more expansive measures were required. Because the Mid-Coast area has historically had high bycatch, a short closure both geographically and temporally that allowed pingers would provide limited bycatch reduction. Particularly, since pinger use has been more widespread in the Mid-Coast, NMFS agrees that bycatch has decreased. This further supports the requirement for continued closure with pingers in such a high bycatch area.

*Comment 60:* One commenter suggested that the months of December and January be added to the time period when pingers are required in Massachusetts Bay.

*Response:* NMFS agrees that adding the months of December and January to the Massachusetts Bay closure would provide additional bycatch reduction. Both the first proposed rule (August 13, 1997) and the December 16-17, 1997 GOMTRT meeting recommended that Massachusetts Bay be closed from February through May. Since the HPTRP relies on each of its components working together collectively to reach MMPA goals, it is possible to shift some of the time/area measures where data are less consistent and still meet the overall objectives. NMFS therefore decided to add the months of December

and January to Massachusetts Bay which creates little additional burden on the fishermen who already have to purchase pingers.

*Comment 61:* One commenter agreed with the March closure and recommended that pingers be expanded to October through January in addition to the proposed time period of February through May. Table 4 in the draft EA shows that the bycatch reduction appears to be calculated based on the use of pingers in Massachusetts Bay in the Fall, yet the plan does not stipulate their use during those months.

*Response:* The shaded areas in Table 4 of the draft EA represent areas where pingers could be applied because they are areas that do not represent complete closures under the Magnuson-Stevens Act; they were selectively included in the calculations.

Bycatch has been high in the fall in Massachusetts Bay in previous years, but in more recent years (1996, 1997) bycatch has decreased significantly during that period. This final rule has extended the Massachusetts Bay pinger closure two months earlier than recommended by the GOMTRT and the proposed rule to include both January and December; this will gain further bycatch reduction in this area and will deflect some of the observed shifts in effort out of the Mid-Coast into the northern portion of Massachusetts Bay. Adding the months of December and January was recommended by another commenter. Since bycatch in the most recent years in October and November has decreased, which may be a result of decreased Days-At-Sea available to fishermen from fishery management measures, or to pinger use in the Mid-Coast which prevented some shifting of effort south into Massachusetts Bay, extending the requirement further into the fall is unwarranted at this time given the measures in the overall HPTRP.

*Comment 62:* One commenter recommended closing the area south of Cape Cod during May except to pingers, noting that bycatch was high in 1994 in this area and that it was recommended by the GOMTRT in December, 1997. This commenter also supported the March 1 through 31 closure and the September 15 through February and February through April pinger requirement.

*Response:* NMFS agrees with extending the spring pinger requirement into May. The recommended closure in the proposed rule addressed concern by the GOMTRT that observer coverage has been low in the Cape Cod South area. However, since zero takes have been observed in the September through November time period and additional

bycatch reduction is expected in May, this will more than offset the fall period. Therefore in the final rule NMFS has changed the closure period in Cape Cod South to December through May.

*Comment 63:* One commenter requested that by June, 1999, NMFS analyze use of larger twine and other gear characteristics as a mechanism for reducing bycatch in the Cape Cod South area. Based on current information, this commenter recommended that pingers be required for December 1 through the end of February, instead of September 15 through April 30.

*Response:* NMFS agrees that gear characteristics should be analyzed for the Cape Cod South area and will provide that information when the GOMTRT meets in mid-1999. NMFS agrees that the start of the fall pinger requirement should be December 1, but disagrees that it should not be extended past February.

*Comment 64:* Many commenters recommended that the closure of Cape Cod South be expanded to include at least two weeks at the end of February and two weeks at the beginning of April, based on historically high bycatch during these periods. One commenter noted that under the current plan, fishing will be allowed without use of pingers during May, a month of high mortality in 1994. This block appears to be shaded in Table 4 of the draft EA, yet pingers are not stipulated in this area during May. This one commenter further recommended that fishing should only be permitted in May with use of pingers.

*Response:* See response to comment 61 with respect to shading in Table 4 of the draft EA. NMFS agrees that pingers should be used in May in Cape Cod South. NMFS also agrees that bycatch has historically been high between February and April. However, the one-month closure in March, surrounded by a closure where pingers are required (December through May) is consistent with the basic strategy of the overall plan, a complete closure surrounded by a much larger time when pingers are required. Additionally, such a closure would cost the fleet \$53 thousand dollars in foregone revenue and affect 23 vessels. For all of these reasons a larger complete closure is not justified at this time.

*Comment 65:* One commenter recommended requiring pinger use in the entire Offshore area during the month of February instead of complete closure in February in Cashes Ledge and required pinger use for the rest of the Offshore area from September 15 through December 31. This would



eliminate the February gear closure of Cashes Ledge.

*Response:* NMFS disagrees with allowing pingers during February in Cashes Ledge and with shortening the pinger use period to the fall only. Bycatch has been observed in both November and in February and is estimated at 45 and 258 animals respectively (1996). Therefore, to make management of this area consistent with the other areas in the HPTRP, a one-month closure surrounded by a period of pinger use during times when bycatch is expected is the most appropriate response. This means retaining the closure in February in Cashes Ledge and extending pinger use in the Offshore area November through March. Even though NMFS agrees that pingers are effective, they are not 100 percent effective. This is the reason why the strategy for the overall HPTRP remains a combination of complete closure and pinger use.

*Comment 66:* One commenter recommends that additional observer coverage was needed in the Offshore area to see if a closure in the month of November should be added to allow for additional bycatch reduction.

*Response:* See response to comment number 65. Observer coverage of this area will continue.

*Comment 67:* One commenter noted that there was never a recommendation for a closure in the Offshore area during the December 1997 meeting, nor did it recommend an expanded area of pinger use of the magnitude proposed. The commenter asked NMFS to justify the Offshore closure area and expanded pinger use.

*Response:* NMFS agrees that the GOMTRT did not recommend a complete closure in this area. However, NMFS disagrees with the second claim; the GOMTRT members present at the December 16-17, 1997 meeting did recommend expanding areas where pingers are required. Specifically, their recommendation was for NMFS to look at the bycatch data and consider closing statistical areas "515, 522 and maybe 521" and require pingers in that area. The Offshore Closure Area defined in the regulations is only part of area 515 and the very northernmost section of areas 521 and 522 and encompasses the area where takes have been observed.

*Comment 68:* One commenter stated that the current Offshore recommendation is excessive since it is based on short time frame of data and observer coverage. The commenter recommended that Cashes Ledge be closed for the month of February unless vessels have pingers but that the expanded Offshore area should be

suspended until more information is gathered.

*Response:* NMFS agrees that data is limited in the Offshore area, but limiting the closure to a small area for short duration has all the inherent problems that have already proven this strategy to be ineffective. In addition, there have been observed takes in other months including November in 1996 and January and May in 1997. Therefore, the proposed strategy is similar to the strategy employed in the other areas of observed bycatch in the GOM, a one month closure followed by a more extensive closure with pingers allowed. However, consistent with other minor changes to the time/area closures in the proposed rule in the fall already discussed (Cape Cod South, Massachusetts Bay), the start of the closure in the Offshore area has been delayed to November 1 in the final rule.

*Comment 69:* One commenter noted that the proposed closure of Cashes Ledge would affect four Maine offshore gillnet vessels that often make a few sets in this area on their way to George's Bank. However the commenter was more concerned with vessels from ports in the Mid-Coast area which do fish this area regularly. The commenter noted that the Mid-Coast area had already met or exceeded its take reduction goals. This commenter recommended that rather than closing the Cashes Ledge area in February, NMFS should leave it open to vessels with pingers and that additional reductions should come from areas which have not yet achieved the results that the Mid-Coast has, like Massachusetts Bay and South Cape Cod.

*Response:* NMFS agrees with the characterization of fishing in the Offshore area, but disagrees that bycatch does not need to be reduced in the Offshore area. The Mid-Coast area never had take reduction goals separate from an overall HPTRP, with the exception of goals stated in the NE Multispecies FMP, goals which have not yet been met. As stated earlier, Mid-Coast fishermen are to be commended for the innovative and expansive efforts they have undertaken to make pingers a viable bycatch reduction alternative to complete closures during some times and areas. However, the reason that the NEFMC measures have not been effective at reducing bycatch overall is that bycatch shifted out of the closed areas into new areas. Increases have been seen in several areas including Massachusetts Bay, Cape Cod South and the Offshore area. Achieving the MMPA goal will not be easy, but most certainly, the overall level of bycatch in the GOM must be reduced. It would be counter productive to allow reduction in one

area to be replaced with bycatch occurring elsewhere, i.e. if you reduce the amount of harbor porpoise take in the Mid-Coast by 100, but then increase it by 100 in the Offshore area, you have a net gain of no bycatch reduction. Therefore, all areas where bycatch has historically occurred in the GOM must be part of this HPTRP. NMFS agrees that further reductions are necessary in areas other than the Offshore area; the plan does contain measures beyond the status quo to reduce observed bycatch in the Cape Cod South area and the Massachusetts Bay area.

*Comment 70:* One commenter stated that the importance of and difficulties in enforcement have been overlooked based on comments by NMFS and the Coast Guard. Specifically, neither enforcement body can determine whether pingers are operational. The U.S. Coast Guard has also stated that anything short of complete closures are difficult to enforce. The commenter concluded that effective mortality reduction is most likely to be achieved by closures, not by use of pingers.

*Response:* NMFS agrees that currently neither NMFS or the U.S. Coast Guard can determine whether or not pingers are working on deployed fishing gear. A hydrophone has been developed that can be used as an enforcement tool to determine whether or not pingers are working. The hydrophone can be towed to evaluate set gear. This will be made available to U.S. Coast Guard and NMFS Enforcement personnel. NMFS also agrees that anything short of complete closures is difficult to enforce, but not impossible.

NMFS disagrees that the closures are more likely to achieve effective mortality reduction. In fact, the closures that have been in effect under the Magnuson-Stevens Act have been ineffective primarily because of the inter-annual variability in harbor porpoise distribution and fishing effort shifts. In order for closures to be effective and to avoid these phenomena, closures would have to be so large that the impact on the fishery would be very disruptive. Such widespread closures are evaluated as an alternative in the EA, which should be consulted for the specific information. Pingers have been demonstrated to be effective, and NMFS has concluded that they are a better alternative for achieving effective mortality reduction while allowing the fishery to continue.

#### *Comments on the Overall Mid-Atlantic Strategy*

*Comment 71:* One commenter asked how the new expanded closures affect the harbor porpoise bycatch estimate

given that the MATRT proposal was expected to achieve a 79 percent reduction in harbor porpoise bycatch?

*Response:* If all assumptions of the statistical models are correct, the additional closures would likely achieve between 88 percent—99 percent reduction in takes over the entire area for all months. However, it is unlikely that all the assumptions used in the data analysis will be proven 100 percent accurate; therefore, the additional measures will help to ensure that the 79 percent reduction in harbor porpoise take is achieved. The reason the assumptions are unlikely to be 100 percent accurate appear to be borne out in the 1997 data. In that year harbor porpoise were taken in the menhaden fishery, countering the assumption that the only subfisheries that catch harbor porpoise are the monkfish and dogfish subfisheries (Palka, 1997).

*Comment 72:* One commenter stated that the changes from fishery-specific strategies to specific gear type strategies appear largely consistent with the MATRT proposal.

*Response:* NMFS agrees.

*Comment 73:* One commenter requested that the gillnet cap of 80 nets and tagging requirements of 2 tags per net be changed to a 160-net-cap and a 1 tag per net requirement to be consistent with the proposed Monkfish FMP requirements.

*Response:* NMFS disagrees with changing the 80-net-cap limit, as proposed in the HPTRP, to a net cap of 160 nets to be consistent with the proposed Monkfish FMP. The 160 net cap set by the Monkfish FMP is too high to achieve the goal of maintaining current fishing effort in the Mid-Atlantic that has historically been associated with locally prevailing practices. NMFS has followed the recommendation of the MATRT to support locally prevailing fishing practices and an 80 net cap limit reflects those practices. The average large mesh fisherman in the Mid-Atlantic employs 80 nets, therefore this average was agreed to be an appropriate limit to cap effort. By allowing 160 nets, the positive benefits expected from the HPTRP measures could be negated. Anyone wishing to fish in the Mid-Atlantic during these time periods can only have a total of 80 nets on board, hauled, or deployed. NMFS agrees with the recommendation to change the net tag requirement to one tag per net, beginning January 1, 2000, to be consistent with the net tag requirement under the Monkfish FMP. This change should not affect NMFS' ability to enforce the HPTRP measures.

*Comment 74:* Several commenters felt that the requirement for a twine size

greater than or equal to .81 mm is unfair and uncalled for in those fisheries targeting bluefish, croaker, weakfish (i.e., some of the very small mesh fisheries) which have not been observed to take harbor porpoise. They felt that the MATRT, including NMFS, agreed that there was not enough data to support any restrictions to the small mesh fishery.

*Response:* NMFS did not restrict fisheries with mesh sizes 4 inches (10.2 cm) and smaller with regard to twine size regulations in the proposed HPTRP.

Based on further review and public comment, mesh sizes of 5 inches (12.7 cm) and smaller are not required to comply with the small mesh regulations at this time.

*Comment 75:* Two commenters questioned how the proposed rule applies to all fishing with gillnets in inshore and offshore waters of the Mid-Atlantic despite the fact that North Carolina gillnet fisheries targeting bluefish, croaker, and weakfish, have little or no interactions with harbor porpoise.

*Response:* NMFS agrees there were no documented observed takes with very small mesh gear in North Carolina. However, there were takes in North Carolina waters. Harbor porpoise stranding data, discussed by the MATRT but not considered part of the MATRT process for management measures, suggests that very small mesh fisheries, and fisheries in nearshore as well as offshore waters, may indeed take harbor porpoise. However, NMFS is exempting the gear that is less than 5 inches (12.7 cm) mesh size from the regulatory measures at this time. The definition of the small mesh gear that must comply with the management measures has been changed. Only mesh sizes of greater than 5 inches (12.7 cm) to less than 7 inches (17.78 cm) must comply with the small mesh management measures.

*Comment 76:* One commenter felt that the small mesh fishery in North Carolina should be classified as a Category III fishery. If not designated as Category III, then they felt that the restrictions on small mesh should only apply north of the North Carolina/Virginia border and not include North Carolina waters. If small mesh restrictions were to be implemented for North Carolina waters, those restrictions should absolutely not apply south of Cape Hatteras.

*Response:* Until NMFS gets additional information, the small mesh fishery is still categorized as part of the Mid-Atlantic coastal gillnet fishery. As discussed in the Final List of Fisheries for 1998 (63 FR 5748), the information

currently available on the composition and distribution of the Mid-Atlantic coastal gillnet fishery and on its incidental take levels is insufficient to identify distinct subcomponents of this fishery. NMFS has allocated funding in 1998 to expand its observer coverage of this fishery and to obtain a better characterization of the individual subcomponents that comprise it.

Regarding the geographic application of the small mesh measures to North Carolina waters, the final rule will continue to apply to all waters off North Carolina, including waters south of Cape Hatteras to the South Carolina border. The geographic application of the HPTRP is consistent with the MATRT report (RESOLVE, 1997).

Additionally, although there were takes in North Carolina waters with large mesh gear but no documented observed takes with small mesh gear, this does not preclude the likelihood that takes may occur in North Carolina waters in small mesh gear (see response to comment 38).

*Comment 77:* One commenter felt that the statement on page 48678 of the proposed rule distorts the consensus agreement of the MATRT because there was never an assumption that the only subfisheries that could potentially ever catch harbor porpoise are dogfish and monkfish.

*Response:* NMFS did not intend to distort the consensus agreement of the MATRT. The assumption that harbor porpoise are only caught in dogfish and monkfish fisheries was discussed at the MATRT meetings and is outlined in the paper by Palka (handout at the August 4–6 meeting of the MATRT, Page 8) and used in the statistical analysis presented at the MATRT. Because of the nature of the assumptions in that analysis, discussed in detail in the EA/HPTRP, NMFS felt additional regulatory measures were appropriate.

*Comment 78:* Several commenters were concerned that NMFS had not considered the difficulty for small mesh fishermen in ordering and rigging the new gear. Mesh sizes used to target weakfish and croaker are normally not stocked by local net shops in .81 twine size. The time to order, receive and hang webbing would be as long as six months. Fishermen need 180 days advanced public notice or fishermen would lose out on whole season. So .81 mm should only apply to gill nets greater than 5 inches (12.7 cm) and less than 7 inches (17.78 cm) stretched mesh.

*Response:* In the final rule, NMFS changed the requirements for the small mesh fisheries so that the requirements apply only to mesh sizes of greater than

5 inches (12.7 cm) to less than 7 inches (17.78 cm). Fisheries which use greater than 5 inches (12.7 cm) to less than 7 inch (17.78 cm) mesh sizes should be able to buy the gear and re-rig in the allotted time. Southern Mid-Atlantic fishermen would have more time to buy and re-rig because measures do not go into effect in the southern Mid-Atlantic until February 1, 1999.

*Comments on the Mid-Atlantic Area and Gear Specific Measures*

*Comment 79:* One commenter asked why NMFS expanded the closure in the Mudhole from February 15 through March 15, as recommended by the MATRT, to an additional closure from April 1 through April 20.

*Response:* The HPTRP calls for closures in the Mudhole from February 15 through March 15 for small mesh and large mesh gear, and April 1 through April 20 for large mesh gear. This differs from the MATRT report, which only recommended closures in the Mudhole from February 15 through March 15 for monkfish (large mesh). NMFS added a closure to New Jersey for large mesh gear in April. Given the considerable assumptions inherent in the subfishery bycatch analysis, NMFS determined that additional regulatory measures would be prudent to realistically achieve the bycatch reduction goals of the HPTRP. For New Jersey, January and April are the months of highest bycatch. Since a closure in January would be very costly for the fishermen, as discussed by the MATRT, NMFS chose to limit fishing opportunity in April instead of January. A closure in April would still afford significant harbor porpoise conservation benefits, still be consistent with the proposed Monkfish FMP regulations and not cause undue impact on fishermen. The Mudhole is part of New Jersey waters.

*Comment 80:* One commenter asked that NMFS explain the reason for expansions of the original 20-day monkfish closure for the southern Mid-Atlantic, as proposed by the MATRT, to a one month closure for large mesh fishery.

*Response:* The MATRT recommended a 20-day floating closure in the southern Mid-Atlantic, sometime between February and April, for the monkfish (i.e., large mesh) fishery. The exact 20 days would be chosen by the individual fishermen. This proposal was changed by NMFS in two ways: (1) The proposal for a floating closure was rejected in favor of a fixed closure and (2) the 20-day closure was expanded by 10 days to a full one month closure.

NMFS changed the floating closure because an FMP and associated permit

system will not be in place for the spring 1999 fishery, thereby making it extremely difficult to enforce and administer a call-in system for this fishery. Therefore, a set period for the closure was favored.

The 20-day closure recommended by the MATRT was expanded to 30 days as a way to more strongly address the harbor porpoise bycatch in the southern Mid-Atlantic during this time period by avoiding a 10-day window of possible fishing effort displacement.

*Comment 81:* One commenter proposed that NMFS move the southern border of the area defined as the Mudhole to 39°05' N. Latitude, instead of 40°05' N. Latitude, to include documented take of harbor porpoise.

*Response:* NMFS disagrees that any changes are needed in the Mudhole definition at this time. The definition of the Mudhole is based on topographic features that support concentrations of target fish species at certain times of the year. Since the majority of takes that occur just south of the Mudhole occur in April in the large mesh fishery, this area has been included in the closure from April 1 through 20 for large mesh gear only. During February, another time of high bycatch inside the Mudhole for both large and small mesh gear, the Mudhole will be closed to both small and large mesh gear. There is little bycatch of harbor porpoise outside the boundaries of the Mudhole, in the rest of New Jersey, during February and March. It is possible that effort could shift outside the Mudhole boundaries during this time period, but gear modifications will be in effect for all areas in New Jersey outside of the Mudhole. This means that a bycatch reduction measure, although it is not a complete closure, is in place for the area outside the Mudhole closure. This is consistent with the overall HPTRP strategy.

*Comment 82:* One commenter questioned the conclusion that the entire state of North Carolina should have a time/area closure. The commenter noted that 250 observer trips on North Carolina boats between 1993 and 1997 using small mesh gear with no reports of harbor porpoise takes and 95 trips with North Carolina Division of Marine Fisheries on striped bass, and 30 more in 1991 on weakfish and no harbor porpoise takes. The commenter objected to the changes in closures for North Carolina for the following reasons: there is no documented bycatch of harbor porpoise in small mesh, the take of 5 harbor porpoise in monkfish and dogfish does not equal high harbor porpoise bycatch, the proposed closure is 50 percent longer than what was

recommended by MATRT, the monkfish fishery will no longer exist off North Carolina, and no observer data for areas south of Ocracoke, North Carolina. The commenter then concluded that for all those reasons, time/area closures should not apply to waters south of the North Carolina/Virginia border. The definition of southern Mid-Atlantic includes the North Carolina/South Carolina border, but the commenter recommended that under no circumstances should south of Cape Hatteras be closed to small mesh gillnets. Several commenters noted that observer data does not justify extending small mesh restrictions to the North Carolina/South Carolina border.

*Response:* The time/area closure applies to the large mesh fishery for one month in the southern Mid-Atlantic. Between 1995 and 1996 there were 89 takes in North Carolina in the large mesh fishery, warranting the need for a closure during times of high bycatch. The small mesh fishery is closed for one month in the New Jersey Mudhole, but not in the southern Mid-Atlantic.

Although 5 observed takes does not appear to equal a high harbor porpoise bycatch, when estimated for the entire fishery it does appear to be a significant number of takes, resulting in an estimated take of 132 for the North Carolina fishery in 1996.

The proposed large mesh closure is 10 days longer than what was recommended by the MATRT as explained in response to comment number 80.

Although monkfish may not be able to be legally fished off North Carolina in the future, the mesh size (i.e., greater than 7 inch (17.78 cm) mesh) may be used to fish for other species. As mentioned previously, it is the type of gear and not the target species that is of concern to harbor porpoise bycatch reduction.

There are observer data south of Ocracoke, in fact, observer data span the entire North Carolina coast. NMFS agrees that observer data through 1996 shows that there are no observed takes from January through April south of Cape Hatteras. However, this is the boundary that was agreed to by the MATRT and is documented in the MATRT report. Additionally, even though stranding data were not used in developing the plan, stranding data do indicate that there is a gillnet fishery interaction problem south of Cape Hatteras. Primarily because it was a MATRT recommendation, NMFS is retaining the boundary of the plan at the North Carolina/South Carolina boundary.

*Comment 83:* One commenter supported a 30-day closure from mid-

February through mid-March rather than allowing individual fishermen to determine the 30-day block.

*Response:* The final rule implements the 30-day closure from mid-February to mid-March.

*Comment 84:* One commenter noted that the MATRT was generally supportive of a pinger study in the Mid-Atlantic. If pingers are effective in New England, they should also be effective in the Mid-Atlantic. The commenter questioned why NMFS is only proposing time/area closures and gear modifications and not supporting a pinger study in the Mid-Atlantic. Several commenters stated that the industry has indicated support for experimental pinger studies, and questioned why NMFS suggests only time/area closures to achieve goals and recommended that Mid-Atlantic fishermen should be given the option of choosing between gear modifications and time/area closures and participating in experimental fisheries using pingers. Two commenters stated that no consensus was reached in the MATRT because of the unjustified objections of one scientist/advocate and a small number of conservation members.

*Response:* See response to comment 41 for a discussion of why pingers were not chosen as an alternative in the Mid-Atlantic. NMFS agrees that the industry indicated support for a pinger study in the Mid-Atlantic but disagrees that objections were of lesser magnitude or lesser justification. Both points of view were strongly supported by respective advocates.

*Comment 85:* One comment supported the determination not to use pingers in the Mid-Atlantic.

*Response:* This component of the plan differs from the GOM component because rather than using a series of time and areas closed to fishing and times and areas where acoustic deterrents are required, the Mid-Atlantic portion requires a suite of gear modifications. The distinction in management measures between the two regions is appropriate in this case for a number of reasons. The regions differ markedly in stages of development with regard to harbor porpoise conservation. Whereas the GOMTRT and similar groups have been meeting and proposing various bycatch reduction measures for the GOM for many years, the MATRT has only met in the last two years. The GOMTRT proposed a number of measures initially which did not include mandated pinger use prior to the current recommendation. Based on new information, those measures were determined to be unsuccessful in achieving the PBR level. With regard to

the use of pingers as an appropriate management measure in the GOM, no data exist to support other options, except for total closure to sink gillnet fishing. In the Mid-Atlantic, data indicated other options in the form of gear modifications might be successful in reducing bycatch without some of the uncertainties surrounding widespread pinger use.

For the Mid-Atlantic area, the HPTRP would institute the first set of management measures to reduce harbor porpoise bycatch in that region. Since a number of options are available which may be successful, NMFS would implement non-acoustic measures before proposing pinger testing. Additionally, the MATRT did not fully support a pinger experiment in the Mid-Atlantic area at this time. The gear modifications and time/area closures recommended by the MATRT and included in this final rule are expected to be sufficient.

*Comment 86:* One commenter questioned the justification for the prohibition of tie downs in the small mesh gillnet fisheries for the sole purpose of avoiding the potential for effort shifts (i.e., into the monkfish fishery). The commenter stated that this is inconsistent with NMFS' stated intent to avoid subfishery-specific regulations, it is a regional council issue, and it is non-substantive since inshore gillnet fishermen do not tie down their nets because that would decrease harvest efficiency. Another commenter argued that given the monkfish and dogfish proposed management measures under the FMPs, it is highly unlikely that individual fishermen will try to circumvent the monkfish regulations and land monkfish through tying down their nets.

*Response:* It is difficult to speculate what fishermen will do. While it is true that this overall plan is meant to avoid the sub-fishery specific regulations and while the potential for effort shifts is speculative, removing this uncertainty is important to this HPTRP being able to reach its goals. It is unclear why the prohibition would be a problem to fishermen since the commenter states that inshore fishermen do not tie-down their nets for any other reason.

*Comment 87:* One commenter noted that the proposed rule responded to their comment addressing concern over the boundary line between the GOM and Mid-Atlantic, but they were still not satisfied with where the line was drawn. The recommendation is to use the boundary between the New England and Mid-Atlantic FMCs as specified in the Magnuson-Stevens Act, with the exception of the GOM closed area south

of Cape Cod that is slightly west of the two Councils. Further the commenter recommended that vessels employing small mesh less than 5 inches (12.7 cm) should not be subject to twine size modification requirements and noted that all small mesh less than 7 inches (17.78 cm) will still have to comply with the closure in the New Jersey Mudhole from February 15 through March 15 and other requirements.

*Response:* NMFS maintains the position as stated in the proposed rule, that the line used to separate the two plans indicates the area where the characteristics of the fisheries on either side of that line diverge; it is a line already familiar to fishermen because it is used for fishery management purposes, and is overall a more appropriate boundary than a purely administrative boundary.

NMFS has changed the requirements for the small mesh fishery. Mesh sizes of 5 inches (12.7 cm) and less will not have to comply with the management measures at this time.

*Comment 88:* One commenter stated that NMFS should commit to providing observer coverage to small mesh fishery because data are lacking.

*Response:* NMFS has already provided observer coverage during 1998 to the Mid-Atlantic small mesh fishery and plans to continue such coverage in the future.

#### *Comments on Enforcement*

*Comment 89:* One commenter stated that enforcement of fishing in closed areas or fishing without pingers must be enforced.

*Response:* NMFS agrees and is currently investigating information concerning noncompliance.

*Comment 90:* Two commenters suggested that NMFS can address the difficulty in inspecting pingers by requiring that working pingers be on all nets at all times, except for the summer months when porpoise are not interacting with the fishery. This may also facilitate dockside inspection and remove some of the enforcement concerns.

*Response:* NMFS is addressing the difficulty in inspecting pingers by developing an enforcement hydrophone. NMFS is not proposing deployment of pingers on every gillnet in the Gulf of Maine during the time harbor porpoise are interacting with the fishery for several reasons. First, the overall environmental effects of widespread pinger use cannot be predicted with current information and research is just beginning at this point. Habituation and displacement of harbor porpoise and questions of pingers attracting seals are

still being evaluated. Second, the plan appears to be able to reach its bycatch reduction goal by a more limited approach. Requiring pingers on every net would increase the economic burden to fishermen, when a more limited version that will achieve plan goals is available.

*Comment 91:* One commenter recommended that NMFS expand the HPTRP and the EA to provide a thorough description of the steps that could be taken to ensure that pingers are properly deployed and maintained.

*Response:* The HPTRP requires fishermen to attend a certification program in order to fish with pingers in areas that otherwise are closed by the HPTRP. In addition, outreach and education will be ongoing during plan implementation and will include information on proper deployment and maintenance of pingers.

*Comment 92:* One commenter recommended that NMFS provide regulatory guidance as to how NMFS intends to certify and enforce proposed pinger parameters.

*Response:* The regulations include specifications for pingers that are required to be used in the NE multispecies gillnet fishery. All pingers used in this fishery must meet those specifications. Pinger manufacturers would need to provide documentation to consumers that their pingers meet the specifications of these regulations. NMFS is not requiring that these manufacturers have their pingers certified by an independent company to ensure that they meet the specifications. NMFS will be periodically monitoring whether the pingers used by the fishery meet the specifications.

Because the harbor porpoise bycatch rate will be carefully monitored, NMFS expects that both manufacturers and fishermen will be aware of the importance of technically correct and properly maintained pingers. If bycatch goals are not achieved because of improper pinger use or non-effective acoustics, more restrictive measures to reduce bycatch may be warranted. Additionally, a specific research program begins with rule implementation that will monitor pingers during normal use to ensure that the acoustics of pingers do not change with time, and that they maintain the acoustical characteristics specified by the manufacturer.

*Comment 93:* Two commenters felt that rather than focusing on subfisheries according to the MATRT recommendations, NMFS has extended the regulations to all gillnet activity because of enforcement concerns. One commenter suggested that the basis for

NMFS differing with the MATRT's "solution" was that NMFS does not have enough manpower to enforce the regulations. Those fisheries without interaction should not be penalized for NMFS' lack of enforcement staff.

*Response:* Enforcement of regulations is a valid concern but the enforcement issues with regard to the HPTRP are not just a matter of adequate staff. A regulation must be legally as well as administratively enforceable. For example, a call-in system, which was recommended by the MATRT, is very difficult to enforce because there is no defined monkfish fishery or dogfish fishery at this time, so no one is legally defined as a monkfisherman or a dogfisherman. To do so under this rule, being promulgated under the MMPA, would go well beyond the scope of this plan. NMFS did not contemplate instituting a permit system of the dogfish and monkfish fisheries pending the development of permit systems under the Magnuson-Stevens Act system. Without a permit system, a fisherman can say they are targeting any number of species and still use the same gear that will take harbor porpoise. NMFS' intent in this HPTRP is to avoid the opportunity to take harbor porpoise because of the gear employed.

#### Classification

The Assistant Administrator, NMFS, determined that the TRP is necessary for the conservation of harbor porpoise and is consistent with the MMPA and other laws.

This rule has been determined to be significant for purposes of E.O. 12866.

NMFS prepared an FRFA that describes the impact of this rule on small entities. The need for, and objectives of this rule and a summary of the significant issues are described elsewhere in this preamble. Comments on the economic aspects of the proposed rule (comments 55, 56, 64) and NMFS' responses to those comments stated in the preamble to the final rule are incorporated in the FRFA. The GOM sink gillnet and Mid-Atlantic coastal gillnet fisheries are directly affected by the action and are composed primarily of small business entities.

In formulating this action, NMFS considered a number of alternatives: Alternative 1, the proposed action or Preferred Alternative; Alternative 2, no action; Alternative 3, wide-spread use of pingers; and Alternative 4, wide-spread time and area closures. In addition, a number of alternatives suggested in the comments were also considered. These alternatives were discussed in comments 19, 20, 21, 22, 23 and 41 above.

Alternative 1, a combination of area closures, pinger requirements, and gear modifications, is the preferred alternative because it will achieve the goals of the MMPA while minimizing the overall economic impact to the affected fisheries.

Under Alternative 1, it is estimated that 95 vessels (35 percent of total, 54 percent of impacted) would see their total costs increase more than 5 percent. The cost increase is due to purchasing new gear or pingers, and the cost of gear marking requirements. Vessels could avoid these cost increases by not fishing during the time periods when they would have to modify their gear or by using pingers. However, they would then lose some percentage of their yearly profit. The total economic losses of the Preferred Alternative to the GOM and the Mid-Atlantic regions are estimated to be between \$609 thousand dollars and \$4.5 million dollars, depending on the number of vessels that can shift their effort to open areas and the number that use pingers.

The costs associated with this rule are not related to reporting requirements. To the extent that the rule would allow fishery participants to select whether to acquire a new gear type or to avoid the time/area closures, performance requirements can be substituted for design requirements at the participant's discretion. Since most of the affected entities are small entities, providing an exemption for small entities would not enable the agency to meet the conservation and management goals of the MMPA.

Currently, the NE Multispecies sink gillnet fishery is subject to regulations under the NE Multispecies FMP. Recent groundfish conservation measures for the Gulf of Maine were proposed under Framework Adjustment 25 to the NE Multispecies FMP. The predominant Mid-Atlantic gillnet fisheries are not subject to regulations under an FMP at this time. The final rule is designed to complement Framework 25 and other fishery management regulations. The recommendations of the GOMTRT were modified by NMFS to take into consideration the combined effect of Framework 25 and the HPTRP on Gulf of Maine fishermen.

Under Alternative 2, there would be no additional costs to the fleet either through gear modifications and purchase of pingers or through losses in surplus due to time and area closures. Therefore, based on costs which the fleet would incur, this alternative is the least costly when compared with the Preferred Alternative or non-preferred alternatives. However, there is a much larger cost in terms of foregone harbor

porpoise protection. Based on the contingent valuation study conducted by the University of Maryland (Strand, *et al.*, 1994), households in Massachusetts were willing to pay between \$176 and \$364 to eliminate human induced mortality of 1,000 harbor porpoise. Using the lower figure of \$176 multiplied by the number of Massachusetts households, and amortizing the total using a 7 percent rate yielded a yearly value of roughly \$28 million. This means that decreasing mortality by 1,000 animals would increase consumer surplus by \$28 million. Therefore, when compared against the other alternatives, the status quo is far inferior because it does not achieve the same level of consumer surplus due to a higher level of harbor porpoise mortality.

Alternative 3 would require all vessels fishing between September and May in the Gulf of Maine and between January and April in the Mid-Atlantic to use pingers. Each vessel owner would decide whether to purchase pingers based on his or her own set of circumstances. Each pinger was estimated to cost \$50 dollars based on information obtained from NMFS Sea Sampling personnel. It is assumed that there would be one pinger required per net, and one on each buoy line. Using the average number of nets and strings fished in each region, a weighted average \$3,437 dollars per vessel was estimated for the cost of pingers which translates into a total fleet cost of \$608 thousand dollars.

The cost of pingers was estimated to be \$608 thousand dollars if all vessels purchase pingers. However, some vessels may be unable to afford pingers. This would increase the total losses because vessels that were unable to afford pingers would have to stay tied up at the dock and, therefore, lose revenue. It is assumed that losses in producer surplus are linearly related to the percent of vessels that purchase pingers. For example, if 50 percent of the vessels use pingers, then the losses in producer surplus and crew rents will be reduced by 50 percent. Total pinger costs are also estimated based on the percent of vessels which purchase pingers. Losses calculated using these assumptions are estimated to be between zero and \$7.4 million dollars.

In reality, vessels can either purchase pingers and continue to fish and shift their effort to other areas, or elect not to purchase pingers and stay tied up at the dock. Because the time and areas where pingers are required are quite extensive, it is unlikely that vessels will be able to switch areas and continue fishing without pingers. Without a more formal

model, it is not possible to predict the number of vessels which will adopt either strategy.

This alternative is not preferred because it is unclear whether it could achieve the bycatch reduction goals, particularly in the Mid-Atlantic, because pingers have not been proven to be effective in this area. In addition, there are a number of scientific concerns regarding the impacts of widespread pinger use on harbor porpoise and other marine organisms. This alternative is not preferred given that more data is needed on the ecosystem effects of widespread pinger and given that other methods are available in the Mid-Atlantic to reduce harbor porpoise bycatch.

Alternative 4 would result in a total loss in producer surplus and crew rents for both regions of \$7.4 million dollars. Overall, 177 vessels would be impacted for a per vessel loss of roughly \$42 thousand dollars. As described in the FRFA, the cost to the fishery in terms of economic impacts would vary by area closure. Refer to the FRFA for a discussion of the impacts of this alternative based on the closure variations.

Vessels could shift their operations to other areas and make up for any revenue loss. This puts bounds on the losses of between zero, if revenue was totally replaced in other areas, and \$7.4 million dollars. For this alternative, it will be more difficult for vessels to shift to other times and areas because the areas are all closed at the same time. There is the opportunity for vessels from New England to move to the Mid-Atlantic in the fall or to the NE closure area. Some may do so, but it is likely that most would not be able to switch. Gillnet vessels have traditionally fished in certain times and areas depending on many factors, including the vessels homeport. Because these times and areas are so extensive, it is unlikely that many vessels will be able to shift their operations and replace lost revenue.

Because the times and areas designated for closure are so extensive, it is likely that this alternative would reduce harbor porpoise mortality to close to zero. The trade-off for this reduction would be a much higher cost to the fishing fleet and possibly a higher likelihood of business failure; therefore this alternative is not preferred. However, it is not possible to evaluate the trade-off between reduced harbor porpoise mortality and increased costs. Based on the contingent valuation study discussed earlier (Strand *et al.*, 1994), harbor porpoise are highly valued by consumers.

The potential losses of the Preferred Alternative discussed above depend on assumptions about how individual vessels will react to the regulations. In most cases, these assumptions were very conservative in order to estimate the maximum possible losses. Non-Preferred Alternative 4 has the potential to cost more than either the Preferred Alternative, Non-Preferred Alternative 2 and Non-Preferred Alternative 3. This is because the area closures are large, and last for multiple months. The losses for Alternative 4 are expected to be \$7.4 million dollars, and it is unlikely that vessels would be able to fish elsewhere to offset their losses. Allowing the use of pingers in the Preferred Alternative will lower the cost to the fleet, even with the price of pingers included. The provisions in the plan which allows the use of pingers in the New England region lowers the losses in the Preferred Alternative for New England vessels to \$0.49 million dollars if all vessels elected to use pingers. The actual losses which will occur depend on which strategy vessels adopt to continue operating in the face of these regulations. Clearly, allowing pingers to be used will lower the cost to the fleet because it gives vessels added flexibility.

Non-Preferred Alternative 2 is lower in cost than any of the alternatives in terms of losses the fleet will incur. However, the losses in consumer surplus because of high harbor porpoise mortality are likely to be far greater than the losses in producer surplus and crew rents. If the contingent valuation study conducted by the University of Maryland is accurate, then the value of losses from harbor porpoise mortality would be far greater than any of the other options.

Non-Preferred Alternative 3 is the least costly alternative if all vessels impacted by the plan chose to fish with pingers. To the extent that some vessels would not be able to afford pingers, the costs will increase. Implicit in the analysis of this alternative was the assumption that the mortality reduction was the same as the Preferred Alternative. This assumption may not be true because pingers have not been formally tested in some of the times and areas where they would be allowed under this alternative. If mortality was higher, gains in consumer surplus would not be as high as under the Preferred Alternative, which means this alternative would have lower benefits than the Preferred Alternative.

In response to public comments, NMFS shortened the time periods when pingers would be required in certain areas, and reduced the number of net

tags required in the Mid-Atlantic region. This lowered the estimated costs by approximately \$613,000 from the proposed rule which was submitted.

In summary, Alternative 1 will allow NMFS to achieve MMPA goals, reduction of harbor porpoise bycatch to acceptable levels, while minimizing the overall impact to affected fisheries, compared to the other available alternatives. Alternative 1 accomplishes this by placing carefully considered time-area closures in place, and allowing the use of bycatch reduction devices instead of total closures. This allows fishermen to continue to generate revenue. Further, Alternative 1 is less costly than other alternatives that would require pingers in the Gulf of Maine the entire time harbor porpoise are present there. A copy of this analysis is available from NMFS (see ADDRESSES).

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA). The collection of this information has been approved by the Office of Management and Budget, OMB control number 0648-0357.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays the OMB control number.

The final rule requires nets in the Mid-Atlantic region to be marked in order to identify the vessel and enforce net cap provisions. It is estimated that each tag will take 1 minute to attach to the net, and each net requires one net tag. The total number of nets which will need to be tagged is estimated by assuming that combination gillnet vessels are, on average, fishing 60 nets, and all other vessels are, on average, fishing 30 nets. This gives a weighted average of 49 nets per vessel. Using these figures, the total burden hours is estimated to be 49 minutes per vessel.

The 76 vessel owner/operators will have to order net tags, estimated at 2 minutes per request. Depending on whether net tags are lost or damaged, vessels are expected to only have to comply once over three years. The annual average over the 3 years would be 25.3 vessels affected.

Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS and OMB (see ADDRESSES).

An informal consultation under the ESA was concluded for the HPTRP on November 12, 1998. As a result of the informal consultation, the Assistant

Administrator determined that these actions are not likely to adversely affect endangered or threatened species or their critical habitat.

The 30-day delayed effectiveness requirement under the Administrative Procedure Act has been shortened in part. The requirements in 50 CFR 229.33(a)(2), the Mid-Coast Closure Area, become effective immediately upon publication; the requirements in 50 CFR 229.33(a)(5), the Offshore Closure Area, become effective December 8, 1998; and 50 CFR 229.33(a)(3), (a)(4), the Massachusetts Bay and Cape Cod South Closure Areas become effective December 16, 1998. For all other components of the HPTRP, the requirements become effective January 1, 1999. The shortened time periods are necessary to reduce take of harbor porpoise at the beginning of the high-take season. The areas identified have different effective dates based on the need to have take reduction measures in place for harbor porpoise and on the ability of fishermen in that area to acquire additional pingers. Specifically, the current closure in the Mid-Coast area under the Magnuson-Stevens Act allows fishermen to fish with pingers in the closed area from November 1 through December 31. In addition, experimental fisheries have occurred in this area from September 15 through October 31 and again also during the March 25 through April 25 Magnuson-Stevens Act harbor porpoise closure. Therefore, most of the Mid-Coast fleet that intends to fish in December already has gear outfitted with pingers. A limited number of fishermen in both the Cape Cod South and Massachusetts Bay areas already have pingers from limited experimental fisheries that occurred in those areas. This means that fishermen that will need to purchase pingers in December are those fishing in the Cape Cod South, Offshore, and Massachusetts Bay Closure areas. NMFS has inquired and believes that enough pingers will be available to supply fishermen that choose to fish at that time. These areas will have a week to two weeks, depending on the area, to purchase the pingers and deploy them on the nets. Providing a delayed effectiveness period for requiring pingers in the Offshore Closure area a week later than the Mid-Coast area is justified because bycatch is known to be consistently high in the Mid-Coast area at the time this rule will be effective. Shortening the delay of effectiveness period for requiring pingers in the Offshore Closure area to a week less than other areas is justified because less than 10 fishermen are known to use the Offshore Closure area

year round, and moreover, it is an area of high bycatch. Accordingly, the Assistant Administrator finds that there is good cause to shorten the 30-day delayed effectiveness period under 5 U.S.C. 553(d)(3) regarding pinger requirements.

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#### List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: November 25, 1998.

#### Andrew A. Rosenberg,

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 229 is amended as follows:



**PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972**

1. The authority citation for part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

2. In § 229.2, definitions for “Large mesh gillnet”, “Mesh size”, “Mudhole”, “Small mesh gillnet”, “Southern Mid-Atlantic waters”, “Stowed”, “Tie-down”, and “Waters off New Jersey” are added, in alphabetical order, to read as follows:

**§ 229.2 Definitions.**

\* \* \* \* \*

*Large mesh gillnet* means a gillnet constructed with a mesh size of 7 inches (17.78 cm) to 18 inches (45.72 cm).

\* \* \* \* \*

*Mesh size* means the distance between inside knot to inside knot. Mesh size is measured as described in § 648.80(f)(1) of this title.

\* \* \* \* \*

*Mudhole* means waters off New Jersey bounded as follows: From the point 40°30' N. latitude where it intersects with the shoreline of New Jersey east to its intersection with 73°20' W. longitude, then south to its intersection with 40°05' N. latitude, then west to its intersection with the shoreline of New Jersey.

\* \* \* \* \*

*Small mesh gillnet* means a gillnet constructed with a mesh size of greater than 5 inches (12.7 cm) to less than 7 inches (17.78 cm).

\* \* \* \* \*

*Southern Mid-Atlantic waters* means all state and Federal waters off the States of Delaware, Maryland, Virginia, and North Carolina, bounded on the north by a line extending eastward from the northern shoreline of Delaware at 38°47' N. latitude (the latitude that corresponds with Cape Henlopen, DE), east to its intersection with 72°30' W. longitude, south to the 33°51' N. latitude (the latitude that corresponds with the North Carolina/South Carolina border), and then west to its intersection with the shoreline of the North Carolina/South Carolina border.

\* \* \* \* \*

*Stowed* means nets that are unavailable for use and that are stored in accordance with the regulations found in § 648.81(e) of this title.

\* \* \* \* \*

*Tie-down* refers to twine used between the floatline and the lead line as a way to create a pocket or bag of netting to trap fish alive.

\* \* \* \* \*

*Waters off New Jersey* means all state and Federal waters off New Jersey, bounded on the north by a line extending eastward from the southern shoreline of Long Island, NY at 40°40' N. latitude, on the south by a line extending eastward from the northern shoreline of Delaware at 38°47' N. latitude (the latitude that corresponds with Cape Henlopen, DE), and on the east by the 72°30' W. longitude. This area includes the Mudhole.

\* \* \* \* \*

3. In § 229.3, paragraphs (k) through (p) are added to read as follows:

**§ 229.3 Prohibitions.**

\* \* \* \* \*

(k) It is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies, from the areas and for the times specified in § 229.33 (a)(1) through (a)(6), except with the use of pingers as provided in § 229.33 (d)(1) through (d)(4). This prohibition does not apply to the use of a single pelagic gillnet (as described and used as set forth in § 648.81(f)(2)(ii) of this title).

(l) It is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any gillnet gear from the areas and for the times as specified in § 229.34 (b)(1) (ii) or (iii) or (b)(2)(ii).

(m) It is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any large mesh or small mesh gillnet gear from the areas and for the times specified in § 229.34 (c)(1) through (c)(4) unless the gear complies with the specified gear restrictions set forth in those provisions.

(n) Beginning on January 1, 1999, it is prohibited to fish with, set, or haul back sink gillnets or gillnet gear, or leave such gear in closed areas where pingers are required, as specified under § 229.33 (c)(1) through (c)(4), unless a person on board the vessel during fishing operations possesses a valid pinger certification training certificate issued by NMFS.

(o) Beginning on January 1, 2000, it is prohibited to fish with, set, haul back, or possess any large mesh or small mesh gillnet gear in Mid-Atlantic waters in the areas and during the times specified under § 229.34(d), unless the gear is properly tagged in compliance with that provision and unless a net tag certificate is on board the vessel. It is prohibited to refuse to produce a net tag certificate or net tags upon the request of an authorized officer.

(p) *Net tag requirement.* Beginning on January 1, 2000, all gillnets fished,

hauled, possessed, or deployed during the times and areas specified below must have one tag per net, with one tag secured to every other bridle of every net and with one tag secured to every other bridle of every net within a string of nets. This applies to small mesh and large mesh gillnet gear in New Jersey waters from January 1 through April 30 or in southern Mid-Atlantic waters from February 1 through April 30. The owner or operator of fishing vessels must indicate to NMFS the number of gillnet tags that they are requesting up to the maximum number of nets allowed in those paragraphs and must include a check for the cost of the tags. Vessel owners and operators will be given notice with instructions informing them of the costs associated with this tagging requirement and directions for obtaining tags. Tag numbers will be unique for each vessel and recorded on a certificate. The vessel operator must produce the certificate and all net tags upon request by an authorized officer.

4. In subpart C, new §§ 229.33 and 229.34 are added to read as follows:

**§ 229.33 Harbor Porpoise Take Reduction Plan Implementing Regulations—Gulf of Maine.**

(a) *Restrictions*—(1) *Northeast Closure Area.* From August 15 through September 13 of each fishing year, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies, from Northeast Closure Area. This prohibition does not apply to a single pelagic gillnet (as described and used as set forth in § 648.81(f)(2)(ii) of this title). The Northeast Closure Area is the area bounded by straight lines connecting the following points in the order stated:

NORTHEAST CLOSURE AREA

Point	N. Lat.	W. Long.
NE1	( <sup>1</sup> )	68°55.0'
NE2	43°29.6'	68°55.0'
NE3	44°04.4'	67°48.7'
NE4	44°06.9'	67°52.8'
NE5	44°31.2'	67°02.7'
NE6	( <sup>1</sup> )	67°02.7'

<sup>1</sup> Maine shoreline.

(2) *Mid-coast Closure Area.* From September 15 through May 31, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies. This prohibition does not apply to a single pelagic gillnet (as described and used as set forth in § 648.81(f)(2)(ii) of this title). The Mid-



Coast Closure Area is the area bounded by straight lines connecting the following points in the order stated:

MID-COAST CLOSURE AREA

Point	N. Lat.	W. Long.
MC1	42°30'	(1)
MC2	42°30'	70°15'
MC3	42°40'	70°15'
MC4	42°40'	70°00'
MC5	43°00'	70°00'
MC6	42°00'	69°30'
MC7	43°30'	69°30'
MC8	43°00'	69°00'
MC9	(2)	69°00'

<sup>1</sup> Massachusetts shoreline.  
<sup>2</sup> Maine shoreline.

(3) *Massachusetts Bay Closure Area.* From December 1 through May 31, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies from the Massachusetts Bay Closure Area, except with the use of pingers as provided in paragraph (d)(2) of this section. This prohibition does not apply to a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title). The Massachusetts Bay Closure Area is the area bounded by straight lines connecting the following points in the order stated:

MASSACHUSETTS BAY CLOSURE AREA

Point	N. Lat.	W. Long.
MB1	42°30'	(1)
MB2	42°30'	70°30'
MB3	42°12'	70°30'
MB4	42°12'	70°00'
MB5	(2)	70°00'
MB6	42°00'	(2)
MC7	42°00'	(1)

<sup>1</sup> Massachusetts shoreline.  
<sup>2</sup> Cape Cod shoreline.

(4) *Cape Cod South Closure Area.* From December 1 through May 31, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies from Cape Cod South Closure Area, except with the use of pingers as provided in paragraph (d)(3) of this section. This prohibition does not apply to a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title). The Cape Cod South Closure Area is the area bounded by straight lines connecting the following points in the order stated:

CAPE COD SOUTH CLOSURE AREA

Point	N. Lat.	W. Long.
CCS1	(1)	71°45'
CCS2	40°40'	71°45'
CCS3	40°40'	70°30'
CCS4	(2)	70°30'

<sup>1</sup> Rhode Island shoreline.  
<sup>2</sup> Massachusetts shoreline.

(5) *Offshore Closure Area.* From November 1 through May 31, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies from Offshore Closure Area, except for the use of pingers as provided in § 229.33(d)(4). This prohibition does not apply to a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title). The Offshore Closure Area is the area bounded by straight lines connecting the following points in the order stated:

OFFSHORE CLOSURE AREA

Point	N. Lat.	W. Long.
OFS1	42°50'	69°30'
OFS2	43°10'	69°10'
OFS3	43°10'	67°40'
OFS4	42°10'	67°40'
OFS5	42°10'	69°30'

(6) *Cashes Ledge Closure Area.* For the month of February of each fishing year, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies from the Cashes Ledge Closure Area. This prohibition does not apply to a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title). The Cashes Ledge Closure Area is the area bounded by straight lines connecting the following points in the order stated:

CASHES LEDGE CLOSURE AREA

Point	N. Lat.	W. Long.
CL1	42°30'	69°00'
CL2	42°30'	68°30'
CL3	43°00'	68°30'
CL4	43°00'	69°00'
CL5	42°30'	69°00'

(b) *Pingers*—(1) *Pinger specifications.* For the purposes of this subpart, a pinger is an acoustic deterrent device which, when immersed in water, broadcasts a 10 kHz (±2 kHz) sound at 132 dB (±4 dB) re 1 micropascal at 1 m, lasting 300 milliseconds (±15 milliseconds), and repeating every 4 seconds (±.2 seconds).

(2) *Pinger attachment.* An operating and functional pinger must be attached at the end of each string of the gillnets and at the bridle of every net within a string of nets.

(c) *Pinger training and certification.* Beginning on January 1, 1999, the operator of a vessel may not fish with, set or haul back sink gillnets or gillnet gear, or allow such gear to be in closed areas where pingers are required as specified under paragraph (b) of this section, unless the operator has satisfactorily completed the pinger certification training program and possesses on board the vessel a valid pinger training certificate issued by NMFS. Notice will be given announcing the times and locations of pinger certification training programs.

(d) *Use of pingers in closed areas*—(1) Vessels, subject to the restrictions and regulations specified in paragraph (a)(2) of this section, may fish in the Mid-coast Closure Area from September 15 through May 31 of each fishing year, provided that pingers are used in accordance with the requirements of paragraphs (b) (1) and (2) of this section.

(2) Vessels, subject to the restrictions and regulations specified in paragraph (a)(3) of this section, may fish in the Massachusetts Bay Closure Area from December 1 through the last day of February and from April 1 through May 31 of each fishing year, provided that pingers are used in accordance with the requirements of paragraphs (b) (1) and (2) of this section.

(3) Vessels, subject to the restrictions and regulations specified in paragraph (a)(4) of this section, may fish in the Cape Cod South Closure Area from December 1 through the last day of February and from April 1 through May 31 of each fishing year, provided that pingers are used in accordance with the requirements of paragraphs (b) (1) and (2) of this section.

(4) Vessels, subject to the restrictions and regulations specified in paragraph (a)(5) of this section, may fish in the Offshore Closure Area from November 1 through May 31 of each fishing year, with the exception of the Cashes Ledge Closure Area. From February 1 through the end of February, the area within the Offshore Closure Area defined as "Cashes Ledge" is closed to all fishing with sink gillnets. Vessels subject to the restrictions and regulation specified in paragraph (a)(5) of this section may fish in the Offshore Closure Area outside the Cashes Ledge Area from February 1 through the end of February provided that pingers are used in accordance with the requirements of paragraphs (b) (1) and (2) of this section.

(e) *Other special measures.* The Assistant Administrator may revise the requirements of this section through notification published in the **Federal Register** if:

(1) After plan implementation, NMFS determines that pinger operating effectiveness in the commercial fishery is inadequate to reduce bycatch to the PBR level with the current plan.

(2) NMFS determines that the boundary or timing of a closed area is inappropriate, or that gear modifications (including pingers) are not reducing bycatch to below the PBR level.

**§ 229.34 Harbor Porpoise Take Reduction Plan—Mid-Atlantic.**

(a)(1) *Regulated waters.* The regulations in this section apply to all waters in the Mid-Atlantic bounded on the east by 72°30' W. longitude and on the south by the North Carolina/South Carolina border (33°51' N. latitude), except for the areas exempted in paragraph (a)(2) of this section.

(2) *Exempted waters.* All waters landward of the first bridge over any embayment, harbor, or inlet will be exempted. The regulations in this section do not apply to waters landward of the following lines:

New York

40° 45.70' N 72° 45.15' W TO 40° 45.72' N  
72° 45.30' W (Moriches Bay Inlet)  
40° 37.32' N 73° 18.40' W TO 40° 38.00' N  
73° 18.56' W (Fire Island Inlet)  
40° 34.40' N 73° 34.55' W TO 40° 35.08' N  
73° 35.22' W (Jones Inlet)

New Jersey

39° 45.90' N 74° 05.90' W TO 39° 45.15' N  
74° 06.20' W (Barnegat Inlet)  
39° 30.70' N 74° 16.70' W TO 39° 26.30' N  
74° 19.75' W (Beach Haven to Brigantine  
Inlet)  
38° 56.20' N 74° 51.70' W TO 38° 56.20' N  
74° 51.90' W (Cape May Inlet)  
39° 16.70' N 75° 14.60' W TO 39° 11.25' N  
75° 23.90' W (Delaware Bay)

Maryland/Virginia

38° 19.48' N 75° 05.10' W TO 38° 19.35' N  
75° 05.25' W (Ocean City Inlet)  
37° 52.1' N 75° 24.30' W TO 37° 11.90' N 75°  
48.30' W (Chincoteague to Ship Shoal  
Inlet)  
37° 11.10' N 75° 49.30' W TO 37° 10.65' N  
75° 49.60' W (Little Inlet)  
37° 07.00' N 75° 53.75' W TO 37° 05.30' N  
75° 56.1' W (Smith Island Inlet)

North Carolina

All marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by NOAA (Coast Charts 1:80,000 scale), and as described in 33 CFR part 80.

(b) *Closures*—(1) *New Jersey waters.* From April 1 through April 20, it is prohibited to fish with, set, haul back,

possess on board a vessel unless stowed, or fail to remove any large mesh gillnet gear from the waters off New Jersey.

(2) *Mudhole.* From February 15 through March 15, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any large mesh or small mesh gillnet gear from the waters off New Jersey known as the Mudhole.

(3) *Southern Mid-Atlantic waters.* From February 15 through March 15, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any large mesh gillnet gear from the southern Mid-Atlantic waters.

(c) Gear requirements and limitations—(1) *Waters off New Jersey—large mesh gear requirements and limitations.* From January 1 through April 30 of each year, no person may fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any large mesh gillnet gear in waters off New Jersey, unless the gear complies with the specified gear characteristics. During this period, no person who owns or operates the vessel may allow the vessel to enter or remain in waters off New Jersey with large mesh gillnet gear on board, unless the gear complies with the specified gear characteristics or unless the gear is stowed. In order to comply with these specified gear characteristics, the gear must have all the following characteristics:

(i) *Floatline length.* The floatline is no longer than 4,800 ft (1,463.0 m), and, if the gear is used in the Mudhole, the floatline is no longer than 3,900 ft (1,188.7 m).

(ii) *Twine size.* The twine is at least 0.04 inches (0.090 cm) in diameter.

(iii) *Size of nets.* Individual nets or net panels are not more than 300 ft (91.44 m, or 50 fathoms), in length.

(iv) *Number of nets.* The total number of individual nets or net panels for a vessel, including all nets on board the vessel, hauled by the vessel or deployed by the vessel, does not exceed 80.

(v) *Tie-down system.* The gillnet is equipped with tie-downs spaced not more than 15 ft (4.6 m) apart along the floatline, and each tie-down is not more than 48 inches (18.90 cm) in length from the point where it connects to the floatline to the point where it connects to the lead line.

(vi) *Tagging requirements.* Beginning January 1, 2000, the gillnet is equipped with one tag per net, with one tag secured to each bridle of every net within a string of nets.

(2) *Waters off New Jersey—small mesh gillnet gear requirements and limitations.* From January 1 through

April 30 of each year, no person may fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any small mesh gillnet gear in waters off New Jersey, unless the gear complies with the specified gear characteristics. During this period, no person who owns or operates the vessel may allow the vessel to enter or remain in waters off New Jersey with small mesh gillnet gear on board, unless the gear complies with the specified gear characteristics or unless the gear is stowed. In order to comply with these specified gear characteristics, the gear must have all the following characteristics:

(i) *Floatline length.* The floatline is less than 3,000 ft (914.4 m).

(ii) *Twine size.* The twine is at least 0.031 inches (0.081 cm) in diameter.

(iii) *Size of nets.* Individual nets or net panels are not more than 300 ft (91.4 m or 50 fathoms) in length.

(iv) *Number of nets.* The total number of individual nets or net panels for a vessel, including all nets on board the vessel, hauled by the vessel or deployed by the vessel, does not exceed 45.

(v) *Tie-down system.* Tie-downs are prohibited.

(vi) *Tagging requirements.* Beginning January 1, 2000, the gillnet is equipped with one tag per net, with one tag secured to each bridle of every net within a string of nets.

(3) *Southern Mid-Atlantic waters—large mesh gear requirements and limitations.* From February 1 through April 30 of each year, no person may fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any large mesh gillnet gear in Southern Mid-Atlantic waters, unless the gear complies with the specified gear characteristics. During this period, no person who owns or operates the vessel may allow the vessel to enter or remain in Southern Mid-Atlantic waters with large mesh sink gillnet gear on board, unless the gear complies with the specified gear characteristics or unless the gear is stowed. In order to comply with these specified gear characteristics, the gear must have all the following characteristics:

(i) *Floatline length.* The floatline is no longer than 3,900 ft (1,188.7 m).

(ii) *Twine size.* The twine is at least 0.04 inches (0.090 cm) in diameter.

(iii) *Size of nets.* Individual nets or net panels are not more than 300 ft (91.4 m or 50 fathoms) in length.

(iv) *Number of nets.* The total number of individual nets or net panels for a vessel, including all nets on board the vessel, hauled by the vessel or deployed by the vessel, does not exceed 80.

(v) *Tie-down system.* The gillnet is equipped with tie-downs spaced not more than 15 ft (4.6 m) apart along the floatline, and each tie-down is not more than 48 inches (18.90 cm) in length from the point where it connects to the floatline to the point where it connects to the lead line.

(vi) *Tagging requirements.* Beginning January 1, 2000, the gillnet is equipped with one tag per net, with one tag secured to each bridle of every net within a string of nets.

(4) *Southern Mid-Atlantic waters—small mesh gillnet gear requirements and limitations.* From February 1 through April 30 of each year, no person may fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any small mesh gillnet gear in waters off New Jersey, unless the gear complies with the specified gear characteristics. During this period, no person who owns or operates the vessel may allow the vessel to enter or remain in Southern Mid-Atlantic waters with small mesh gillnet gear on board, unless the gear complies with the specified gear characteristics or unless the gear is stowed. In order to comply with these specified gear characteristics, the gear must have all the following characteristics:

(i) *Floatline length.* The floatline is no longer than 2118 ft (645.6 m).

(ii) *Twine size.* The twine is at least 0.03 inches (0.080 cm) in diameter.

(iii) *Size of nets.* Individual nets or net panels are not more than 300 ft (91.4 m or 50 fathoms) in length.

(iv) *Number of nets.* The total number of individual nets or net panels for a vessel, including all nets on board the vessel, hauled by the vessel or deployed by the vessel, does not exceed 45.

(v) *Tie-down system.* Tie-downs are prohibited.

(vi) *Tagging requirements.* Beginning January 1, 2000, the gillnet is equipped with one tag per net, with one tag secured to each bridle of every net within a string of nets.

(d) *Other special measures.* The Assistant Administrator may revise the requirements of this section through notification published in the **Federal Register** if:

(1) After plan implementation, NMFS determines that pinger operating effectiveness in the commercial fishery is inadequate to reduce bycatch to the PBR level with the current plan.

(2) NMFS determines that the boundary or timing of a closed area is inappropriate, or that gear modifications (including pingers) are not reducing bycatch to below the PBR level.

[FR Doc. 98-31957 Filed 11-25-98; 4:21 pm]

BILLING CODE 3510-22-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 630

[I.D. 111698C]

#### Atlantic Swordfish Fishery; Quota Adjustment

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notification of quota adjustment.

**SUMMARY:** NMFS adjusts the 1998 North Atlantic swordfish fishery quota to carryover the unharvested portion of the 1997 quota.

**DATES:** Effective December 2, 1998.

**FOR FURTHER INFORMATION CONTACT:** Jill Stevenson, 301-713-2347.

**SUPPLEMENTARY INFORMATION:** The U.S. Atlantic swordfish fishery is managed under the Fishery Management Plan for Atlantic Swordfish. Regulations at 50 CFR part 630 are issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (codified at 16 U.S.C. 1801 *et seq.*) and the Atlantic Tunas Convention Act (ATCA) (codified at 16 U.S.C. 971 *et seq.*). Regulations issued under the authority of ATCA implement the recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT).

NMFS recently revised quota adjustment procedures for the Atlantic swordfish fishery in a final rule published on September 29, 1998 (63 FR 51856). These revised procedures allow for carryover of unharvested quota from one fishing year to the next, provided such carryover is consistent with the applicable recommendation of ICCAT. Current ICCAT recommendations provide for carryover from 1997 to 1998 of unharvested swordfish quota from the North Atlantic stock but not the South Atlantic stock. Therefore, this quota adjustment pertains to the 1998 quota for the North Atlantic swordfish stock only.

For both semiannual periods of the 1997 fishing year, NMFS closed the longline/harpoon directed fishery for North Atlantic swordfish based on projections of when the quota for each semiannual period would be caught. The closures were effective October 12, 1997, for the first semiannual period and March 31, 1998, for the second. When NMFS tallied actual catches for both periods, NMFS determined that the

entire 1997 longline/harpoon quota of 2121.2 metric tons dressed weight was not harvested, leaving 224.6 metric tons available for carryover. Additionally, the entire 1997 directed fishery quota of 42.8 mt allocated to driftnet gear remained unharvested due to a year long emergency closure of that fishery issued under authority of the Magnuson-Stevens Act (62 FR 30775, June 5, 1997) and the Endangered Species Act (62 FR 63467, December 1, 1997). Finally, out of the 1997 incidental catch quota of 300 mt, a total of 232.1 mt of swordfish were taken incidentally in fisheries targeting other species (e.g., yellowfin tuna, bigeye tuna, squid) including longline landings after the directed fishery closures. This leaves 335.3 mt (224.6 + 42.8 + 67.9) available for carryover to the 1998 fishing year.

Regulations on adjustment procedures require that any underharvest from the prior fishing year be apportioned equally between the two semiannual fishing periods and be allocated so that the new directed fishery gear quotas represent the same proportion of the adjusted quota as they did before the quota adjustment. Given that the first 1998 semiannual period will end on November 30, 1998, that the driftnet fishery remains closed for the remainder of the 1998 fishing year, and that NMFS has published a proposed rule to prohibit further use of driftnet gear in the North Atlantic swordfish fishery (63 FR 55998, October 20, 1998), NMFS has decided to allocate the entire amount of the 1997 underharvest (335.3 mt) to the 1998 second semiannual directed fishery for longline and harpoon gear.

In addition to the 1997 carryover adjustment, NMFS also makes inseason adjustments to the 1998 North Atlantic swordfish allocations. According to the regulations, if NMFS determines it is necessary to close a directed fishery, any estimated underharvest of that directed fishery quota will be used to adjust the annual incidental catch quota. In 1998, a closure based on catch projections (63 FR 41205, August 3, 1998) resulted in an underharvest of the 1998 North Atlantic swordfish driftnet quota (14.6 mt remaining). NMFS did not reopen this fishery due to protected species bycatch concerns. Therefore, NMFS allocates the unharvested 14.6 mt of the 1998 driftnet quota to the 1998 North Atlantic swordfish incidental catch category.

The quotas for the 1998 North Atlantic swordfish fishery were previously established (62 FR 55357, October 24, 1997) to provide 1028.5 mt for each semiannual period in the directed (longline/harpoon) fishery, 41.6