

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

29 July 2003

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

Dear Ms. Colligan:

On 30 June 2003 the National Marine Fisheries Service published in the *Federal Register* a notice of intent to prepare an environmental impact statement on actions to implement the Atlantic Large Whale Take Reduction Plan. The notice requested comments on management options that should be considered in the document to reduce the incidental deaths of North Atlantic right whales, humpback whales, and fin whales in commercial fisheries along the U.S. East Coast. The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors, has reviewed the request and offers the following comments.

General Comments

The only surviving population of North Atlantic right whales numbers about 300 whales, making it one of the most endangered species in the world. There have been no signs of its recovery over the past twenty years. Deaths due to entanglement in fishing gear and collisions with ships have been major factors in its failure to recover. Similarly, there are no signs that management actions taken to date have reduced entanglement rates of right whales or humpback whales. Since June 2001, when the Service completed its last series of biological opinions on fisheries causing these entanglements, 14 right whales been entangled with one known death and at least eight potentially fatal entanglements. Of the eight whales seriously entangled, six were still entangled when last seen. It is likely that at least some of them have died or will die as a result of the entanglement in fishing gear. This rate of mortality and serious injury is almost identical to rates seen in the late 1990s and early 2000s, which prompted the preparation of the June 2001 biological opinions. The North Atlantic right whale population cannot sustain this rate of entanglement-caused deaths and injuries, particularly given continuing deaths due to ship collisions for which no effective management program exists.

Over the past ten years the Marine Mammal Commission has repeatedly noted that the

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Service has relied on untested and unproven gear modifications, especially break-away links, to reduce entanglement risks. We have recommended numerous times that the Service adopt seasonal closures to prohibit lobster and gillnet fishing in all designated right whale critical habitats during periods when whales are known to concentrate in those areas. We also have recommended that the Service (1) require the use of neutrally buoyant or sinking line for ground lines connecting strings of lobster traps in all areas along the East Coast to reduce the amount of lines in the water column that could entangle whales, and (2) implement a dynamic management approach to temporarily suspend fishing in areas where concentrations of right whales are observed feeding.

Our letters to the Service in this regard over the past five years (copies enclosed) provide the rationale for those measures.

### Regulatory Context

Protection of endangered whales in relation to fisheries requires consideration of three different statutes: the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA). The Commission believes that the standards and criteria of all three statutes apply and must be considered and met in order for a management regime to satisfy Congressional intent. This current attempt by the Service to manage the situation under the MMPA's take reduction team provisions will be the second major revision of the Atlantic Large Whale Take Reduction Plan since it was implemented in July 1997. Prior to 1997, the Service managed fishery interactions with Atlantic whales by means of fishery management plans developed by the New England, Mid-Atlantic, and South Atlantic Fishery Management Councils under the MSFCMA and by ESA section 7 consultations. On at least two occasions, the Service's own biological opinions found that some fisheries were likely to jeopardize the continued existence of North Atlantic right whales and other large whales and provided reasonable and prudent alternatives for avoiding jeopardy. Despite management actions recommended and implemented pursuant to those opinions, right whale entanglements and related mortalities have not been reduced.

The above-mentioned ESA biological opinions allow zero incidental take for right whales, humpback whales, and fin whales. Stock assessments prepared by the Service under the MMPA set potential biological removal levels at zero for right whales and very low levels for humpback whales and fin whales. Those are the applicable standards for allowable incidental takes of these species in commercial fisheries. The Marine Mammal Commission therefore recommends that the Service, in the anticipated environmental impact statement, clearly identify the whale protection standards it is required to achieve under the applicable statutes. The Marine Mammal Commission further recommends that the Service analyze and present in the draft EIS all available data regarding Atlantic large whale natural history and interactions with fisheries in a way that identifies the regulatory measures that would be necessary to meet these standards. Such an analysis should examine the following:

- the amount and types of fishing gear used during different seasons;

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- potential gear modifications;
- locations where the gear is currently used or excluded;
- an assessment of the effectiveness of all management measures tried to date and ways to adjust them to be more effective; and
- alternative management measures.

The Commission welcomes the opportunity to assist the Service as it reviews the standards for whale protection relative to fisheries entanglements and develops measures to satisfy those standards. We look forward to working with you on this important undertaking.

If you or your staff has questions regarding these comments and recommendations, please call.

Sincerely,

A handwritten signature in black ink, appearing to read "David Cottingham", with a long horizontal flourish extending to the right.

David Cottingham.  
Executive Director

Enclosures