

comments and any additional information received by the date specified above. All previous comments and information submitted during the comment period need not be resubmitted. The comment period is extended to November 24, 2000. Written comments may be submitted to the Field Supervisor at the above address.

The Endangered Species Act requires that at least one public hearing be held on this proposed rule if requested. Given the interest this proposal has generated, we have already held 10 public hearings throughout the proposed critical habitat range. However, significant public interest in the proposal has led us to schedule another public hearing (see **DATES** and **ADDRESSES**).

Author

The primary author of this notice is Steve Spangle, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103.

Authority: The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Geoffrey L. Haskett,

Regional Director, Region 2, Fish and Wildlife Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 001011283-0283-01; I.D. 082200C]

RIN 0648-AO30

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Harbor Porpoise Take Reduction Plan Regulations; Change to the List of Exempted Waters and Request for Comments

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

ACTION: Notice of proposed rulemaking.

SUMMARY: NMFS proposes to amend the Harbor Porpoise Take Reduction Plan (HPTRP) to include Delaware Bay, landward of the 72 COLREGS line (International Regulations for Preventing Collisions at Sea, 1972), in the list of exempted waters. Members of the Mid-Atlantic Harbor Porpoise Take Reduction Team (MATRT) recommended by consensus that NMFS

redefine the list of exempted waters because harbor porpoise stranding and observer data did not justify subjecting fishers in Delaware Bay to the HPTRP gear restrictions. This proposed rule would exempt fishers operating in Delaware Bay from the HPTRP regulation. NMFS also requests comments on a recommendation from the MATRT to change the definition of small mesh gillnet.

DATES: Comments must be received at the appropriate address (see **ADDRESSES**) by November 27, 2000.

ADDRESSES: Comments on this proposed rule should be sent to Chief, Marine Mammal Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT:

Gregg LaMontagne, NMFS, Northeast Region, 978-281-9291; Diane Borggaard, NMFS, Southeast Region, 727-570-5312; or Emily Hanson, NMFS Office of Protected Resources, 301-713-2322, ext. 101.

SUPPLEMENTARY INFORMATION: On December 2, 1998, NMFS published a final rule (63 FR 66464) implementing the HPTRP. Among other measures, the final rule identified those waters that are exempt from the HPTRP (50 CFR 229.34).

Section 118(f)(9) of the Marine Mammal Protection Act (MMPA) allows NMFS to issue regulations to implement a take reduction plan or amendments to a take reduction plan that, among other things, restricts fishing by time or area. In addition, NMFS' regulations implementing the HPTRP allow the Assistant Administrator for Fisheries, NOAA to revise the requirements of the plan through notification published in the **Federal Register** if NMFS determines that the boundary of a closed area is not appropriate.

The MATRT met on January 13 and 14, 2000, in Alexandria, Virginia. The MATRT recommended by consensus that the line defining the exempted waters of Delaware Bay be moved seaward from the published position of 39° 16.70'N 75° 14.6'W TO 39° 11.25'N 75° 23.90'W (southern point of Nantuxent Cove, NJ to the southern end of Kelly Island, Port Mahon, DE) and be redefined as a line from Cape May Canal to the Lewes Ferry Terminal. The MATRT concluded that there was no compelling reason for the existing position of the line in Delaware Bay, compared to other large bays in the Mid-Atlantic region (e.g., Chesapeake Bay and Long Island Sound), which typically establish the exempted waters as landward of the mouth of an inlet or the 72 COLREGS line. The MATRT believed that the existing line imposed

unnecessary requirements on the Delaware Bay fishing community because harbor porpoise stranding data and observer data did not justify imposing HPTRP gear restrictions on the fishers in Delaware Bay.

This proposed rule would redefine exempted waters for Delaware Bay to include all marine and tidal waters landward of the 72 COLREGS demarcation line, as depicted or noted on nautical charts published by NOAA (Coast Charts 1:80,000 scale), and as described in 33 CFR part 80. Using the COLREGS line is a slight deviation from the MATRT's consensus recommendation. The 72 COLREGS line was selected instead of the line recommended by the MATRT because the 72 COLREGS line is a well known and widely published line of demarcation. The actual difference between the COLREGS line and the MATRT recommended line is a seaward shift of approximately 1 nautical mile.

NMFS used observer data and harbor porpoise stranding data for Delaware and New Jersey to analyze the MATRT's consensus recommendation. Sea sampling observer data from inside the Delaware Bay for 1995 (23 observed hauls) and 1999 (12 observed hauls) were analyzed. During these 35 observed hauls no harbor porpoise interactions occurred. There has been 1 documented take of a harbor porpoise in a shad gillnet as explained in the Environmental Assessment prepared on November 24, 1998. Additional information was provided by a letter dated March 3, 2000, from the New Jersey Division of Fish and Wildlife, which stated that during 11 years of netting and tagging shad and striped bass in Delaware Bay there were no harbor porpoise interactions or sightings.

Stranding data from 1992-1999 revealed a total of 21 stranded harbor porpoise, with 17 stranded on the Delaware side of Delaware Bay and four stranded on the New Jersey side of Delaware Bay. The four New Jersey strandings exhibited no evidence of fishery interactions, although the animals were either emaciated or the cause of death could not be determined. Six of the 17 Delaware strandings displayed evidence of fishery interactions. The majority of the strandings occurred in the Lewes and Broadkill Beach areas near the mouth of Delaware Bay, suggesting that the strandings may have occurred as a result of interaction with dogfish and monkfish fishing activities outside of Delaware Bay, with the animals

stranding inside the Bay after drifting with prevailing ocean currents or tides.

Based on the analysis of observer and stranding data, no increase in harbor porpoise mortality is expected to occur as a result of moving the line delineating exempted waters seaward, and, therefore, NMFS concurs with the MATRT recommendation to include Delaware Bay in the exempted waters of the Mid-Atlantic component of the HPTRP.

NMFS also requests comments on the consensus recommendation of the MATRT to change the definition of small mesh gillnet. As defined in 50 CFR 229.2, small mesh gillnet is defined to mean a gillnet constructed with a mesh size of greater than 5 inches (12.7 cm) to less than 7 inches (17.78 cm). The MATRT recommended changing the definition of small mesh gillnet to mean a gillnet with a mesh size greater than 5.5 inches (13.97 cm) to less than 7 inches (17.78 cm) to provide regulatory relief to fishers utilizing the 5.0–5.5 mesh size gillnets throughout the range of the Massachusetts (MA) portion of the HPTRP. The MATRT felt the bycatch data demonstrated very low harbor porpoise take rates for this mesh size range. However, 1999–2000 sea sampling observer data from the Massachusetts reports 4 takes in 4.9–5.0 inch mesh size gillnet (reported by vessel captain) with shad as the primary species sought. Given this information NMFS is particularly interested in comments regarding the impact of different mesh sizes on harbor porpoise and other marine mammals, the impact of different mesh size regulations on other species, including non-target fish, and the economic impact to the fishery.

Classification

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866.

NMFS prepared an Environmental Assessment (EA) on the final rule (63 FR

231, Dec. 2, 1998) to implement the HPTRP. This proposed action amends the HPTRP and NMFS prepared an Environmental Assessment for this proposed action and found that amending the HPTRP as described in this proposed action will not significantly affect the quality of the human environment.

The Chief Counsel for Regulation for the Department of Commerce certified to the Chief Counsel for Advocacy for the Small Business Administration that this proposed rule would not have a significant economic impact on a substantial number of small entities as follows:

The proposed rule would modify the Harbor Porpoise Take Reduction Plan (HPTRP) to redefine exempted waters for Delaware Bay to be all marine and tidal waters landward of the 72 COLREGS demarcation line.

This proposed action would relieve restrictions on fishers operating in Delaware Bay. At their most recent meeting, the Mid-Atlantic Harbor Porpoise Take Reduction Team (MATRT) concluded that harbor porpoise stranding and observer data did not justify imposing HPTRP gear restrictions on fishers operating in Delaware Bay. The MATRT recommended by consensus that the line defining the exempted waters of Delaware Bay be moved seaward. Based on NMFS' analysis of stranding and observer data, no increase in harbor porpoise mortality is expected to occur as a result of moving the line, and therefore we propose to implement the MATRT's consensus recommendation.

The economic impacts of the proposed change is expected to be positive because it is lifting regulations on fishers operating in Delaware Bay. State fisheries management personnel report that many of the gillnet fisheries operating in Delaware Bay that would benefit from the proposed change are conducted on vessels less than 50 feet in length. These fisheries are typically seasonal, operate from local wharfs, and are not participants in federally managed fisheries. All of the gillnet vessels analyzed in the Final Regulatory Flexibility Analysis (RFA) prepared on November 24, 1998, for the HPTRP qualified as small entities based on

a threshold of \$3 million in gross annual sales. The RFA estimated that 176 vessels would be impacted by the regulations, either through area closures or gear modifications.

New Jersey estimates that 28 fishermen qualified for the 2000 fishing year limited entry directed shad fishery inside Delaware Bay, and some of these fishers may be using small gillnet that is currently regulated by the HPTRP. In 1998, Delaware issued 115 commercial gillnet permits in 1998 and it is reasonable to expect that some of these permit holders operate inside Delaware Bay for some portion of the year and use gear subject to the HPTRP. This proposed action would reduce the regulatory burden on those fishers operating in Delaware Bay and using gillnet regulated by the HPTRP.

This proposed rule is not likely to adversely affect endangered or threatened species.

This proposed rule does not change the determination that the HPTRP will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal management programs of the Atlantic states.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

This proposed rule is promulgated in compliance with all procedural requirements established by the Administrative Procedure Act.

List of Subjects in 50 CFR Part 229

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

Dated: October 22, 2000.

Penelope D. Dalton,

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

For the reasons set out in the preamble, 50 CFR part 229 is proposed to be 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 § 229.34, paragraph (a)(2) is revised to read as follows:

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

(a)***

(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/Delaware

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)
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. (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.' 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.' 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.

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